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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK J. CROSBY,
individually and on behalf of
all others similarly situated,

Plaintiff,

Case No. 1:01-CV-683

v.

HON. RICHARD ALAN ENSLEN

BOWATER INCORPORATED
RETIREMENT PLAN FOR
SALARIED EMPLOYEES OF
GREAT NORTHERN PAPER, INC., and
BOWATER INCORPORATED,

Defendants.

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OPINION

This matter is before the Court to considerate three separate issues: (1) whether to certify this action as a class action pursuant to Federal Rule of Civil Procedure 23; (2) whether to grant or deny the Motion to Dismiss of Defendants (Bowater Incorporated and its Retirement Plan) and the Cross-Motion for Summary Judgment of Plaintiff Frank J. Crosby; and (3) whether to award equitable remedies in the event that Plaintiff succeeds as to his Cross-Motion for Summary Judgment.

On review of the briefing and the papers filed in this matter, the Court dispenses with oral argument since it would unnecessarily protract the resolution of these issues.

FACTS

This is the rare case which for the most part surrounds an isolated legal question. The question is whether the Defendant Retirement Plan was permitted to reduce its payments to a retiree who elected to cash out his retirement benefits based on a mortality discount for years prior to his 65th birthday. There are no disputed factual issues which affect the resolution of this legal question.

Before discussing this question, a few comments are in order about the class certification allegations. As is apparent from the Complaint and the briefing filed, this Complaint stems from a sale of a business which left some workers electing to receive their vested retirement benefits before normal retirement. (*See* Complaint at ¶¶ 9, 63-65.) Plaintiff estimated the number within the class at 350 members. (*Id.*) This estimate was based on the total number of affected works as well as formal studies which indicate that workers who have a cash-out option in retirement benefits almost always elect the cash-out option. (*Id.*) Since providing the estimate, Plaintiff has discovered additional facts and located evidentiary materials pertinent to the likely number of affected workers.

This Plan has been extant since 1992. (Defendants' Response Brief at 8.) Under the terms of the Plan, participants are vested after five years of service. (Plan §§ 10.1, 12.1(a)-(b) and 12.2(b).) Plan data from the most recent Form 5500 Annual Reports confirm that as of January 1, 2000, there were 89 terminated vested participants, 12 retiree participants or beneficiaries receiving annuity payments and 220 active participants. (Plaintiff's Reply Exhibit 35, at Schedule B.) Each of the 220 participants is fully vested. (*Id.*) The 2000 Plan Annual Report also assumes that terminated vested participants, other than annuity recipients, have elected lump sum benefits. This was assumed in the Notes to the Report, which state: "As a result of the sale of GNP, all participants not receiving annuity payments are assumed to take a lump sum distribution on January 1, 2001, as permitted by the Plan."

(Plaintiff's Reply Exhibit 36, at 6.) The financial data contained in the Report likewise suggests this result in that the high amounts paid during the year are the likely consequence of payment of lump sum benefits rather than those payments to the very few participants or beneficiaries electing annuity payments. (*See* Plaintiff's Reply at 12 and documents cited therein.) Similar conclusions are warranted as to the earlier Plan financial reports for 1996 and 1999. (*See* Plaintiff's Reply at 13 and 14 and documents cited therein.) Furthermore, it is rational to assume that during the nearly three years since the 2000 Report, additional participants have retired and have elected lump sum benefits.

Plaintiff has filed his own Affidavit pertinent to the number of class members. His Affidavit states in pertinent part that at the time of the sale most plan participants, to his knowledge, continued to participate in the Plan as workers for the purchaser, Inexecon. (*See* Crosby Affidavit of September 30, 2002 at ¶ 9.) Notwithstanding, it is also apparent from Plaintiff's Affidavit that a significant minority of Plan participants have elected benefits due to retirement and the great majority of those have elected a lump sum payout. (*Id.* at ¶¶ 5-11.) Indeed, Crosby conducted a sample survey of 36 Plan participants.[1] All 36 either had opted to receive lump sum benefits or intended to opt for those benefits in the future. (*Id.*)

Defendants were provided an opportunity to contest these documents and conclusions. Despite the opportunity, Defendants have failed to file any evidentiary materials sufficient to justify a conclusion other than that the number of class members likely to participate in the class are sufficiently numerous to make joinder of all class members impracticable.

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[1]The Court in no way confuses Plaintiff's survey with a scientific or disinterested survey of Plan participants, given Plaintiff's participation in this suit. Nevertheless, those numbers are what they are and suggest conclusions consistent with those reached by Plaintiff.

Plaintiff, and the putative class, are represented by the law firm of Hertz, Schram and Saretsky, P.C. This law firm is nationally recognized for its plaintiff representation in ERISA and employee benefit cases. It has appeared in more than 30 reported cases within the Sixth Circuit Court of Appeals and in an even larger number of cases nationally. It has also won class certification and substantive relief in a number of reported decisions, including the Sixth Circuit's decision in *Rawlings v. Prudential-Bache*, 9 F.3d 513 (6th Cir.1993) and the Eleventh Circuit's decision in *Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan*, 221 F.3d 1235 (11th Cir.2000). The law firm is located in Bloomfield Hills, Michigan. Thus, the law firm and the lead attorney, Bradley Schram, appear to be very experienced and capable advocates for the class.

As to the merits of this action, Plaintiff has brought this action under sections 203(a)(2) and 502(a)(3) of the Employee Retirement Income Security Act ("ERISA") (codified at 29 U.S.C. §§ 1053(a)(2) and 1132(a)(3)). Plaintiff sued Defendants based on his right to benefits which accrued when his employer sold its subsidiary, Great Northern Paper, which employed Plaintiff. Plaintiff was then eligible, and elected, a lump sum distribution of his retirement benefits under the Plan. These benefits were part of an accruing retirement account which had long ago vested. Plaintiff elected to receive his retirement benefit in a lump sum and, consistent with its regular practice, the Defendant Plan Administrator calculated Plaintiff's benefits by use of a "whipsaw calculation," *i.e.*, reducing the benefit to its present value by use of a discount rate (to account for the effect of interest) and a mortality table (to account for the likelihood of Plaintiff's pre-retirement death). Plaintiff does not dispute the use of the discount rate, but does dispute the use of the mortality table as to his pre-65 years. The benefit as computed by Defendants resulted in a lump sum payout of $52,013.90. According to Plaintiff, without the mortality reduction, the amount of the lump sum payout would be computed at $57,262.98.

Defendants' Plan is silent on this precise question. The Plan gives the Defendant Administrator deference to make plan interpretations and requires the employee to exhaust administrative remedies. Plaintiff has exhausted administrative remedies as demonstrated by the correspondence as to this dispute. (See Defendants' Motion to Dismiss, Exhibits 2-5.) Plaintiff's legal claim is that the above computation of his benefits violates the anti-forfeiture rules of section 203(a)(2) of ERISA (29 U.S.C. § 1053(a)(2)) by reducing an accrued benefit. Defendants' position is that the statute and regulations are silent on this point and the Plan Administrator permissibly interpreted the Plan in making this calculation.

CLASS CERTIFICATION STANDARDS

According to the United States Supreme Court, this Court must conduct a "rigorous analysis" into whether the prerequisites of Federal Rule of Civil Procedure 23 are met before certifying a class action. *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). The trial court has broad discretion in deciding whether to certify a class, but that discretion must be exercised within the framework of Rule 23. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981); *In re American Med. Systems, Inc.*, 75 F.3d 1069, 1079 (6th Cir.1996). The "rigorous analysis" requirement means that a class is not maintainable merely because the complaint parrots the legal requirements of Rule 23. *American Med. Systems*, 75 F.3d at 1079. Although a hearing prior to the class determination is not always required, "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Falcon*, 457 U.S. at 160; *see also Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir.1974) (stating that in some cases it will be necessary to give the parties an opportunity to present evidence on the certification question). In this case, an evidentiary hearing is unnecessary because of the extensive briefing in connection with the dispositive motions and because the case centers around a purely legal decision about a calculation method which is applicable to all class members alike.

Rule 23 places the burden of class certification on Plaintiff. *American Medical Systems*, 75 F.3d at 1079; *Senter v. General Motors Corp.*, 532 F.2d 511, 522 (6th Cir.1976). Under the language of the Rule, Plaintiff must prove four prerequisites under subsection (a) and one of the clauses under subsection (b) for the class to be certified. The Rule provides in pertinent part as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(1) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) * * *; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or....

Fed. R. Civ. Proc. 23(a)-(b).

CERTIFICATION ANALYSIS

Under Rule 23, certification analysis first addresses the four preliminary requirements of Rule 23(a)--*i.e.*, (1) numerosity; (2) commonality; (3) typicality; and (4) adequate representation. *Senter*, 532 F.2d at 522. Once these prerequisites are satisfied, then Plaintiff must satisfy one or more of the requirements of subsection (b) for certification. *Id.*

(1) Numerosity

To begin this analysis, the Court must determine whether the class is sufficiently numerous that joinder is impracticable. Numbers alone are not dispositive when the numbers are small, but will dictate impracticability when the numbers are large. H. Newberg and A. Conte, *1 Newberg on Class Actions*, § 3.05 (3rd ed.1992). Although Rule 23 imposes no "numerical" limit, it has been held in this circuit that a class of 35 employees was sufficient to meet the numerosity requirement. *See American Med. Systems*, 75 F.3d at 1076 (citing *Afro American Patrolmen's League v. Duck*, 503 F.2d 294, 298 (6th Cir.1974)); *see also Roman v. Korson*, 152 F.R.D. 101, 105 (W.D.Mich.1993); *Van Vels v. Premier Athletic Center of Plainfield, Inc.*, 182 F.R.D. 500, 507 (W.D.Mich.1998); *Saur v. Snappy Apple Farms, Inc.*, 203 F.R.D. 281, 286 (W.D.Mich.2001).

Here, the expected numbers are much larger. This class action relates to a class of retirees, and future retirees, who either were affected by, or stand to be affected in the future, by Defendants' calculation method for lump sum payments. The evidence cited above clearly demonstrates that the class size is somewhere between 40 and 350 (the total number of plan participants) and is much more likely to consist of the majority of the plan participants since many, if not most, plan participants would retire before age 65 and would elect the option of lump sum payment. (*See* GAO Report, *Private Pensions, Implications of Conversions to Cash Balance Plans*, No. HEHS-00-185, at 4 (Sept. 29, 2000) (Defendants' Reply Exhibit 33) (stating based on survey that majority of plan participants opt for a lump sum payment).) Therefore, the Court determines that the numerosity requirement is met.

(2) Commonality

Rule 23 requires "commonality"--meaning, questions of law and fact common to all class members. *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir.1998). Not all common questions suffice. *Id.* What is necessary for certification are

common issues the resolution of which advance the litigation. *Id.* The purpose of this inquiry, according to the United States Supreme Court, is to ensure that a class action is an economical means of addressing the legal claims and that the legal claims of both representatives and class members will be fairly resolved through the process. *Falcon*, 457 U.S. at 157 n. 13. Once it is determined that there are common questions of law and fact, differences in the amounts of damages sustained by class members will not usually defeat certification. *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir.1988); *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir.1984).

This case is a perfect one for class certification because of truly common questions of law and fact. Each of the class members are participants in the same retirement plan who have been injured by a common practice of the Defendant Retirement Plan--that is, calculation of retirement benefits utilizing a mortality discount for years prior to the participant's 65th birthday. Whether this calculation is proper is purely a legal question under ERISA and the pertinent plan language. Furthermore, resolution of this question will essentially determine liability and equitable relief as to the claims of all class members.

In circumstances like this, *i.e.*, class actions brought on behalf of retirees subject to a common practice of denying benefits, the federal courts have consistently found commonality. *See, e.g., Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1103 (5th Cir.1993) (finding that certification was required under Rule 23 and that there was commonality as to class members who were each vested retirees of the J.C. Penney Company Pension Plan and who were injured by a common method for estimating social security benefits for the purpose of determining retiree benefits); *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir.1998) (following *Forbush* and remanding for certification decision); *Fuller v. Fruehauf Trailer Corp.*, 168 F.R.D. 588, 596 (E.D.Mich.1996) (following *Forbush*).

In fact, the instant case presents an even better case for certification than some of the cases cited. In this case, there is a single plan which applies to all class members and there is a strictly legal dispute as to a standard calculation method utilized by Defendants. As such, the Court determines that there are common questions of law the resolution of which will advance the litigation.

Notwithstanding this commonality, Defendants assert several arguments that are directed toward both the commonality requirement and the typicality requirement of Rule 23. Defendants assert that "future lump sum recipients," who are the bulk of the class and who, unlike Plaintiff Crosby, have not yet been shorted by the Plan, do not have standing to assert a future right to payment, especially since the Plan may be amended in the interim so as to make clear that benefits may be calculated in the manner suggested by Defendants. This argument is thoroughly wrong. To start, once benefits are "accrued" under a Plan, then the anti-cutback rule codified at 29 U.S.C. § 1054(g) prevents plan modifications reducing the accrued benefits. As is explained later in the Court's summary judgment analysis, retiree benefits are "accrued" benefits and not "incident" benefits because they are designated and treated as such in the Plan language. (*See* Plan at Article VII, example 1.) Thus, the premise of this argument (that there could be a change in plan language) is simply mistaken.

Furthermore, future retirees have a clear and significant legal interest in the determination and adjudication of their rights to payment. Under the Plan language, a retiree has a right to select between the lump sum and annuity option when retiring. To intelligently understand that choice, the Retiree must ascertain the method for the calculation of his lump sum benefit. This kind of information is also helpful, if not critical, to both current workers and retirees when making decisions as to whether to continue employment or retire, and as to whether to select lump sum or annuity payment. Therefore, future retirees as well as past retirees have common legal interests and both have legal standing to prosecute requests for equitable relief.

Defendants, in their Response Brief and Sur-Reply, have also asserted a number of arguments which, according to them, undercut the commonality and typicality of class members. The first of these arguments is that although Plaintiff has administratively exhausted his claim for benefits, other class members have not, and this distinction should prevent certification of the class. This argument has already been expressly rejected by the Sixth Circuit in the context of very similar ERISA class actions. Specifically, the *Fallick* decision, noted above, rejected such an argument based on the availability of a futility exception to administrative exhaustion and the clear application of that exception to a standard method of medical benefit calculation. *See Fallick*, 162 F.3d at 419-20. In the instant case, the class representative Plaintiff has exhausted his administrative remedies. It is noteworthy that the *Fallick* decision also cited with approval the decision in *Costantino v. TRW, Inc.*, 13 F.3d 969, 975 (6th Cir. 1994), which similarly applied a futility exception to the exhaustion requirement in an ERISA class action relating to a pension benefit methodology for calculation of payment. Such case law makes clear that class membership should not be limited to persons who have administratively exhausted claims in a case like this one--wherein administrative exhaustion would be pointless because the case involves the legality of a standard calculation method.

Defendants have also argued that class members have dissimilar interests because of potential statute of limitations defenses which they might urge against particular class members. This argument, like Defendants' other arguments, is a thin reed to hang hope upon in the context of the ERISA legislative backdrop. ERISA adopts the pertinent state statute of limitations, which is, in this case, Michigan's six year statute for breach of contract. *See* Mich. Comp. Laws § 600.5807. Second, the ERISA limitation period does not begin to run from a date of payment or calculation of benefits. The ERISA limitation period, under the law of this Circuit and the law of several other federal circuits, does not begin to run until a participant formally presents the claim for benefits to the

pension administrator and has had his claim formally denied. *Stevens v. Employer-Teamsters Joint Council*, 979 F.2d 444, 451 (6th Cir.1992).[2]

In this case, Plaintiff received his final denial letter on June 14, 2001. He filed suit on October 22, 2001. So it is clear that Plaintiff's claim is timely. Moreover, there is no evidence in this record that a single participant of the Plan, prior to Plaintiff, ever made a claim for benefits of this type (*i.e.*, that Defendants were miscalculating the lump sum in the manner described by Plaintiff) prior to Plaintiff's claim for benefits. Indeed, common sense and analysis of the authorities cited herein compel this finding. This is the type of argument familiar to some accountants and attorneys specializing in pension administration, but otherwise lost on the general public, such that there is every reason to believe that this suit is Defendants' first formal denial on this issue. Furthermore, the authorities cited by Plaintiff as to its position, both factual and legal authorities, are documents and testimony which all occurred with the six-year time frame of Michigan's statute of limitations. In fine, in the context of this kind of case, these claims, and these claimants and class members, the statute of limitations is not an applicable defense and will not prevent certification of class claims.

---

[2]As stated in Plaintiff's Sur-Sur-Reply Brief, the cases of *Union Pacific Railroad Co. v. Beckham*, 138 F.3d 325, 330 (8th Cir.1998) and *Cotter v. Eastern Conference of Teamsters Retirement Plan*, 898 F.2d 424, 428-29 (4th Cir.1990), cited by Defendants, actually support Plaintiff's position, since those cases confirm that an ERISA claim does not accrue until the claim has been formally denied. Other limitation arguments made by Defendants, such that case law from Title VII and ADEA contexts should be applied in this context and that past retirees should have exercised "due diligence" regarding the calculation of their benefits, are not persuasive, for the reasons stated by Plaintiff. (*See* Plaintiff's Sur-Sur Reply Brief at 4-6.)

Defendants also argue that commonality and typicality are defeated because a class adjudication might "drain" the assets of the Plan and deprive future recipients of benefits, especially those entitled to annuity payments. Defendants' comments about annuity recipients are not apposite because this class is defined to include only those selecting lump sum benefits. The interests of annuity recipients are not common, but there is no intent to represent those interests. In terms of the suggestion that class certification might drain the Plan, presumably creating some adverse consequences for later lump sum recipients, the present record simply does not support such a result. First of all, there has been no demonstration that if lump benefits are recalculated for past and future recipients that the funds of the Plan will be inadequate to fund the recalculated payments. Second, assuming that the funds of the Plan were inadequate, ERISA, 29 U.S.C. § 1082, requires that a plan sponsor, in this case Defendant Bowater, fund unfunded promised benefits as a condition for the termination of any plan unless the sponsor is insolvent. Since there is also no reason to believe that Defendant Bowater is insolvent, even if there were some shortage of funds, the law would expect these to be paid by Defendant Bowater for the benefit of all class members. Accordingly, the Court rejects Defendants' arguments.

(3) Typicality

Rule 23 requires that the claims asserted by class representatives be typical of class members. *American Med. Systems*, 75 F.3d at 1082. As the Court of Appeals said in the *American Medical Systems* case:

> "Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct...."
>
> * * * *

> .... A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members.

Id. (citation omitted). The typicality requirement, so explained, tends to merge with the commonality requirement. *Falcon*, 457 U.S. at 158 n. 13. Nevertheless, it is a separate inquiry and in particular focuses attention on differences between class representative claims and class claims which would defeat the representative nature of the class action. *Fuller*, 168 F.R.D. at 598.

In this case, the class representative's claims are typical of the claims of class members. Namely, each concern the same plan, the same plan language, the same calculation method, and the same questions of legality under ERISA and the pertinent Treasury Regulations.[3] Therefore, the Court also determines that the typicality requirement is met.

(4) Adequate Representation

Rule 23(a) requires that the class members and their counsel be prepared to provide fair and adequate representation to the class. In *Senter*, the Sixth Circuit articulated two criteria for determining adequacy of representation: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Senter*, 532 F.2d at 525; *see also American Med. Systems*, 75 F.3d at 1083; *Nat'l Ass'n of Reg. Med. Programs v. Mathews*, 551 F.2d 340, 345 (D.C.Cir.1976); *compare Oxendine v. Williams*, 509 F.2d 1405 (4th

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[3]Defendants' other typicality arguments were addressed above.

Cir.1975) (per curiam) (declining to approve prisoner class action because of *pro se* representation).

Plaintiff's Complaint (and the documents filed in connection with the dismissal and summary judgment motions) identify him as a plan participant who has a vested interest in retirement benefits and who has been adversely affected by the Defendants' practice for calculating a cash out of retirement benefits based in part on a mortality reduction for years prior to the participant's 65th birthday. Thus, it appears that the Plaintiff's interests are identical to those of unnamed class members. As for the class counsel, the Plaintiff law firm is a nationally recognized firm with expertise in prosecuting ERISA class actions. This is demonstrated by their history of advocacy in published opinions in this Circuit as well as other Circuits. In fact, the *Lyons* decision, which Plaintiff relies upon in his argument on the merits, was an Eleventh Circuit case in which Plaintiff's counsel was retained as class counsel and which resulted in the Eleventh Circuit's approval of relief for the class. Both Plaintiff and his counsel also appear motivated to zealously represent the class. Thus, the Court approves of Plaintiff and his counsel as adequately representing the class.

(b)(2) Certification

Under Rule 23(b)(2), a class action may be certified for injunctive or declaratory relief if the party opposing the relief requested has acted or refused to act on grounds generally applicable to the class, making the requests for such relief appropriate. The Sixth Circuit's language in *Fallick* implicitly endorsed Rule 23(b)(2) certification in *Forbush*-type ERISA cases. Indeed, in addition to the cases cited above, there are many other federal decisions approving certification under Rule 23(b)(2) as to such claims. *See, e.g., Caranci v. Blue Cross & Blue Shield of Rhode Island*, 194 F.R.D. 27, 39 (D.R.I.2000) (citing *Corsini v. United Healthcare Corp.*, 51 F.Supp.2d 103 (D.R.I. 1999) and *Corsini v. United Healthcare Corp.*, 965 F.Supp. 265 (D.R.I. 1997)); *Groover v. Michelin North America, Inc.*, 187 F.R.D. 662,

667 (M.D.Ala. 1999); *Bower v. Bunker Hill Co.*, 114 F.R.D. 587 (E.D.Wash.1986); *Morgan v. Laborers Pension Trust Fund for Northern California*, 81 F.R.D. 669, 681 (N.D.Cal.1979).

In this instant cause, it is clear from the Complaint and the request for class relief as to the summary judgment motion that Plaintiff is seeking primarily equitable relief in this action--*i.e.*, an injunction requiring recalculation of benefits in accordance with ERISA and a constructive trust to secure payment of additional benefits to class members. Under pertinent case law discussed herein, such remedies are not properly regarded as "monetary relief." Therefore, and in light of the pertinent case law and facts of this case, the Court determines that the requirements of Rule 23(b)(2) are met and that certification is proper under Rule 23(b)(2).[4]

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[4]One thing unusual about the procedural posture of this case is that dispositive motions were filed early (before this Court could schedule any hearing or briefing on class certification) and that the request for certification was then made (in addition to the Complaint) in Plaintiff's Cross-Motion for Summary Judgment, before the filing of the certification motion. While certification in this posture is not the most desired practice under Rule 23, for the reasons explained above, the Court determines that this is the proper instance to address and decide the certification issues as well as the dispositive motions. *See, e.g., Larionoff v. United States*, 533 F.2d 1167, 1183 (D.C.Cir.1976) (approving simultaneous entry of judgment and class certification); *Jimenez v. Weinberger*, 523 F.2d 689, 697 (7th Cir.1975) (stating that "in some cases the final certification need not be made until the moment the merits are decided"); *see also Gurule v. Wilson*, 635 F.2d 782, 788-90 (10th Cir.1980) (allowing post-judgment class certification under Rule 23(b)(2)); *Marshall v. Kirkland*, 602 F.2d 1282, 1301 (8th Cir.1979)(same); *Johnson v. Mathews*, 539 F.2d 1111, 1125 n. 23 (8th Cir.1976) (same); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1372 (6th Cir.1977) (affirming post-judgment certification where there was a lack of

NOTICE AND CLASS DEFINITIONS

Since this Court has certified under Rule 23(b)(2), but not under Rule 23(b)(3), Rule 23 does not direct that notice and opt-out procedures be used. *See* Rule 23(c)(2). Hence, those procedures are not appropriate in this case.

As for the class definition, the Plaintiff has proposed the following class definition:

> All participants or beneficiaries of participants who received a lump sum distribution from the Plan (either directly or indirectly via transfer to an individual retirement account or other eligible retirement plan), or who are entitled to receive a lump sum distribution now or in the future (either direct or indirectly via transfer to an individual retirement account or other eligible retirement plan).

(*See* Complaint at ¶ 63; Brief in Support of Class Certification, at 3.)

Upon review of the particular class definition offered here, the Court finds that it properly and specifically designates class members in an objective fashion. As such, the class definition is approved.

STANDARDS OF REVIEW ON THE MERITS, GENERALLY

Defendants have moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiff's Complaint for failure to state a claim for which relief may be granted. However, because Defendants' Motion to Dismiss raises matters outside the pleadings, the pertinent standard for review of it (as well as Plaintiff's summary judgment motion) is the summary judgment standard of Rule 56. *See Fed. R. Civ. Proc.* 12(b).

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prejudice).

Review of a motion for summary judgment requires the Court to determine if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). It is the function of the Court to decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

STANDARD FOR REVIEW FOR ERISA LEGAL INTERPRETATIONS

Although the parties do not quibble about the general standards of review under the Federal Rules, they do contest whether the Plan Administrator's legal interpretation to use the discount table is entitled to deference or whether it should be reviewed *de novo*. This dispute arises in large part because of the language employed in the famous case of *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Therein, the United States Supreme Court held that a de novo standard of review applies to decisions by plan administrators unless the plan gives the administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan, in which case an arbitrary and capricious standard applies. *Id.* at 115, 109 S.Ct. 948. However, the *Firestone* Court limited its holding to actions under section 502(a)(1)(B) of ERISA, *i.e.*, those "challenging denials of benefits based on plan interpretations." *Id.* at 108.

Plaintiff argues that because his cause of action was brought under section 502(a)(3), not section 502(a)(1)(B), *Firestone* does not apply and *de novo* review is appropriate. Defendants argue, to the contrary, that because this case involves a plan interpretation, regardless of the subsection label attached by Plaintiff, it falls within the deferential standard of *Firestone*.

On review of this argument, the Court believes that the Defendants have the better argument. The *Firestone* holding, while limited on its face, clearly intended itself to apply to plan interpretations. In this case, the Plan grants the Administrator deference and that deference was clearly used in reaching the benefit determination challenged here. Thus, the logic of *Firestone* favors a "clearly erroneous" standard of review. In determining this, the Court is also mindful of both published and unpublished cases of the Sixth Circuit which have applied the *Firestone* standard of review to plan interpretation questions made under sections 502(a)(2) and 502(a)(3). *See Hunter v. Caliber System, Inc.*, 220 F.3d 702, 711 (6th Cir.2000) (finding as to § 1132(a)(1)(B) claim that "this case *is* about benefits, and *Firestone* requires application of the arbitrary and capricious standard if required by the language of the plan"); *Bd. of Admin. v. Huntsman*, 187 F.3d 634, 1999 WL 591458, at *3 (6th Cir. July 27, 1999) (holding that claim brought under section 1132(a)(3) was subject to clearly erroneous review under *Firestone*); *see also Paramore v. Delta Air Lines*, 129 F.3d 1446, 1450 (11th Cir.1997).

Notwithstanding, the Court also determines that a decision on the standard of review is unnecessary to resolve the summary judgment issues because, regardless of the standard of review, clearly erroneous or *de novo*, the Court would adopt the plan interpretation stated below. This is because the legal interpretation stated below is based purely on a legal interpretation of the Plan language and the Court finds the terms used in the Plan to be unambiguous and to require the interpretation stated below. *See Williams v. Int'l Paper Co.*, 227 F.3d 706, 711 (6th Cir.2000).

SUMMARY JUDGMENT ANALYSIS

To put the question succinctly, the question presented here is whether a worker who elected to receive lump sum early retirement benefits is entitled to receive the value of his retirement benefit without a mortality discount for the years until his 65th birthday. To put this question into the context of

the pertinent plan language and regulations, does the above described worker have an accrued interest in the amount of the retirement benefits without reduction for a mortality discount?

Herein, it is acknowledged that section 203(a)(2)(A) of ERISA provides that "an employee [such as Plaintiff] who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions." 29 U.S.C. § 1053(a)(2)(A). It is also not disputed that when an employee elects to take a lump sum distribution that certain deductions are proper under Internal Revenue Service regulations. The Internal Revenue Code and Regulations permit use of "the applicable mortality table" and the "applicable interest rate" in computing present value. *See* 26 U.S.C. § 417(e)(3); Treas. Reg. § 1.417(e)-1(d). Thus, another way to put the question is whether the mortality table was "applicable" when the employee elects to receive lump sum benefits before age 65 in the context of this plan language.

To understand this issue, it is important to contrast two different kinds of retirement plans. Under one kind of plan, the participant, his estate and his survivors lose any interest in the employee contributions for retirement upon the employee's death. Under this kind of plan, which is permitted under the Treasury Regulations if there is explicit plan language so providing, the plan administrator must make an assumption about mortality before retirement age in order to determine how to fund the plan. That is, one cannot determine the amount of funding without knowing the mortality risk. Under a second type of plan, a retiree has a vested interest in his retirement benefits which cannot be defeated by his death such that his estate or other beneficiary is entitled to collect accrued benefits upon his death. Under the second type of plan, a mortality discount is not proper because the assumption of the system is that the money will be made available to each participant regardless of pre-retirement death. In other words, in the later kind of system, the death of a plan participant does not affect plan funding since the money is necessarily paid to a beneficiary in the event of a

participant's death.

In the instant case, the pertinent plan language says: "If a participant dies prior to his Normal Retirement Date, then no benefit of any kind shall be payable from this Plan and Trust except for the death benefit (if any) provided for in this Death Benefit Section. The amount of the Participant's death benefit shall be the then vested present value of the Participant's Accrued Benefit accrued to date of death ...." (Plan § 8.1.) This kind of system is much closer to the second kind of plan envisioned above than the first. The operation of the system does not need to discount the possibility of the participant's death because in such an event the money is paid to the participant's beneficiary. While an employer might be able to reduce or eliminate a true and separate "incidental death benefit" under the ERISA regulations, 26 C.F.R. § 1.411(a)-7, the employee's successor's right to his or her vested benefits could not be reduced in this case precisely because the plan language intended the creation of an accrued right. Another way to say this is that the plan, by giving payment to survivors in the event of death, only provided a mechanism for easy payment; it did not intend to deprive the survivors of the right to receive payment nor leave open the possibility of depriving them in the future.[5] Were the latter intended, the drafters of the Plan, who had control of the plan language, could have much more clearly and explicitly stated the result. The fact that they did not do so tends to show an intent to create an accrued benefit instead of an ancillary benefit.

Furthermore, this conclusion is buttressed by the several arguments made by Plaintiff from the case law, the Treasury Regulations and the knowledgeable authorities cited by Plaintiff. Internal Revenue Service Notice 96-8 contains a

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[5]The end of Defendants' arguments are apparent: namely, if a plan makes its distributions and there is a resulting trust, the resulting trust is the presumptive property of the settlor. *See Borst v. Chevron Corp.*, 36 F.3d 1308, 1315 (5th Cir.1994).

methodology for calculating the cash benefit amounts of participants under cash value plans. Under the recommended methodology, no reduction is made for mortality risks prior to retirement age. *See I.R.S. Notice 96-8* at A-18 to A-19. This case is not the unusual case which would require departure from that methodology. Indeed, leading actuarial experts who have testified before Congress have testified that when a valuation of a cash balance plan of this kind is made, no mortality adjustment until age 65 is to be made. (Testimony of Larry D. Stahly and John F. Woyke, Plaintiff's Exhibits 11 and 12.) Furthermore, under 26 U.S.C. § 1.411(a)-7, "accrued benefits" include not only retirement benefits themselves, but also death benefits which are "directly related" to the value of the retirement benefits. In other words, those death benefits are not "incidental" to the plan's "accrued benefits." The interpretations of the Eleventh Circuit in *Lyons v. Georgia-Pacific Corp.*, 221 F.2d 1235 (11th Cir.2000) and the Second Circuit in *Esden v. Bank of Boston*, 229 F.3d 154 (2nd Cir. 2000) likewise assumed the correctness of Plaintiff's position since those courts utilized Plaintiff's method of calculation and not Defendants' method. Finally, the Southern District of Illinois, *Berger v. Xerox Retirement Income Guaranty Plan*, 231 F.Supp. 2d 804 (S.D.Ill. 2002), recently decided a pension benefit class action case which was prosecuted by Plaintiff's attorneys on the same grounds as this suit. The Berger decision upheld Plaintiff's method of calculation and required restitution to all affected class members.

For these reasons, and those other reasons argued in Plaintiff's Cross-Motion, summary judgment shall be granted in favor of Plaintiff. For the same reasons, Defendants' Motion to Dismiss shall be denied.

REMEDIES

Plaintiff's proposed remedies include an injunction to forbid the future use of the offending calculation as to class members, an injunction requiring re-computation of class member benefits as to benefits already paid and payment of

the difference between the amount previously paid and the recalculated amount plus pre-judgment interest, and a constructive trust over plan assets (or those of Bowater if plan assets are insufficient) sufficient to fund the restitution payments. Plaintiff argues that this relief is consistent with the Supreme Court's decision in *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253 (1993) that relief under ERISA provision 502(a)(3) be for the purpose of redressing a violation or enforcing a provision of ERISA, that it is consistent with the Supreme Court's decisions in *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-51 (2000) and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), which allowed imposition of a constructive trust over plan assets to return property belonging to plan participants. Plaintiff also requests that the restitution payments be made with interest calculated between the date the lump sum payment was initially due and the date restitution is paid at the higher of either the federal post-judgment rate for that period or the rate of return for the plan for the period. *See Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 985 (6th Cir. 2001) (allowing such rate of interest as to a miscalculated lump sum ERISA payment to avoid unjust enrichment).

Defendants oppose this relief on several grounds. Defendants argue that under ERISA, Plaintiff may seek adequate legal relief (an award of damages under section 502(a)(1) of ERISA) and, as such, cannot obtain equitable relief pursuant to section 502(a)(3) of ERISA. *See also Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609, 615 (6th Cir.1998). Defendants also disagree that relief under section 502(a)(1) is inadequate because the section allows a plan participant to sue for benefits due under an ERISA plan. Defendants further argue that the requested relief is not "equitable" in the sense that Plaintiff has mis-characterized a claim for monetary relief as an equitable remedy.

Defendants' concerns, though legitimate, do not defeat the remedies sought in this case. In *Great-West*, 534 U.S. at 204, n. 2, the United States Supreme Court recognized that in the context of ERISA cases, and particularly under section 502(a),

the district courts may enter appropriate equitable relief including equitable restitution and a constructive trust requiring the return of monies wrongfully retained. In *Harris Trust*, 530 U.S. at 250-53, the Supreme Court commented on a statement in Great-West that orders to pay money are "almost invariable" monetary relief. The Supreme Court reviewed that "comment" in *Harris Trust* when it stated that under Section 502(a)(3) an injunction t require return of monies wrongfully transferred is appropriate equitable relief. *Id.* Plaintiff's position is also supported by the Supreme Court's decision in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). Plaintiff's position is also strongly supported by the recent unpublished decision in *Berger*, which treated equitable restitution of monies withheld because of a mortality discount as a proper equitable remedy under ERISA.

Not only do case authorities support Plaintiff's position, but Plaintiff's position is commended by the pure dint of logic, the nature of the ERISA claim and the nature of the remedial processes. Plaintiff is not seeking here a monetary award of a sum certain. Such issues as to whether his years of service or earnings have been properly credited are not before the Court. Rather, Plaintiff is seeking the more limited, but more effective, remedy of an order requiring recalculation consistent with ERISA non-forfeiture regulations (and future correct calculation). This remedy will make Plaintiff whole, as well as other class members, without resort to time-consuming legal remedies, which would require separate and prolonged jury considerations of the amounts due each claimant--which are mostly likely not disputed anyway and which are subject to certain mathematical calculations to be performed by the Plan consistent with the Court's instructions.

Additionally, in cases like this, the Sixth Circuit has directed that equitable relief include an award of pre-judgment interest (*i.e.*, interest on unpaid benefits between the date of benefit payment and the date of judgment) at the greater rate of either federal post-judgment rate (under 28 U.S.C. § 1961) or the rate of return earned by the Plan on the unpaid benefits of affected workers. *Rybarczyk v. TRW, Inc.*,

235 F.3d 975, 985 (6th Cir.2000). This is done to make class members whose claims were previously paid whole and to deprive Defendants of the benefit of the wrongful conduct. *Id.* Although Defendants concur that the district court has authority to order pre-judgment interest in an ERISA benefit case in which benefits were wrongly withheld, they also imply that the Court should not use its discretion in this case. This argument is rejected because this Court, like the Sixth Circuit panel in *Rybarczyk*, believes that pre-judgment interest is necessary to fully compensate past-retirees and to avoid the Plan from taking untoward advantage of the use of those retirees' funds between the time of their retirement and the Judgment in this suit.

As to the calculation of pre-judgment benefits, Defendants have not commented on pre-judgment interest as to class members, but have commented that an award of pre-judgment interest to Crosby should be limited to the federal funds rate at the time of the entry of judgment because a higher rate would give him a windfall. (*See* Defendants' Sur-Reply Brief at 6-7.) Plaintiff then contends that applying the federal post-judgment rate to a pre-judgment award would be unfair to class members because the federal post-judgment/current 52- week Treasury bill rate is historically low and would under-compensate past retirees for the losses during periods of their retirement at which interest rates were much higher. Plaintiff's last argument ignores two facts. First, the pre-judgment rate utilized in *Rybarczyk* was the higher rate of either the current post-judgment rate or the Plan's rate of return for the affected period. Second, the Court will order that this calculation be done individually as to affected retirees for the time periods pertinent to their own individual retirements. In other words, a retiree who has lost the use of a portion of his or her lump retirement because of the faulty calculation is entitled to receive pre-judgment interest for the affected time period (the time between the payment of the incorrect benefit amount and the date of judgment) at the greater of the post-judgment interest rate at the time of judgment or the Plan's rate of return for the

particular time period pertinent to the retired worker. Though this calculation is somewhat administratively complex, it is clearly workable given the availability of mathematical software and the ready financial data needed to make the calculations. Thus, the Court will require that these calculations be made individually as to all affected class members, including Plaintiff Crosby. The Court will also require Defendants to share the financial data supporting its calculations with Plaintiff, so that Plaintiff can verify the accuracy of the calculations.[6]

With this said, though, Plaintiff has not made a sufficient case for the receipt of any equitable relief other than an injunction requiring recomputation and proper payment of benefits with pre-judgment interest as to benefits already paid. Such monies held by the Plan are already held in trust for Plan participants. While the monies held by Bowater, Inc. are not held in trust for plan participants, there is no sufficient basis to conclude, on the present record, that existing plan funds are inadequate to fund payments without additional contributions from the plan sponsor. Thus, while the Court accepts Plaintiff's premise that the plan sponsor is required legally to adequately fund a plan and should at times deposit additional funds in a plan to guarantee sufficient payment, there is simply an inadequate evidentiary record at this point in time to warrant the imposition of a constructive trust as to Defendant Bowater, Inc.'s assets. While so holding, Defendant Bowater, Inc. should be advised that the sword of justice is now unsheathed. If, in the future, it is apparent that the Plan is short of funds to pay the required benefits, this Court is prepared to entertain and grant a post-judgment motion requiring additional

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[6]Should Plaintiff have significant questions about the calculations upon review of the data, the Plaintiff would be free to request post-judgment discovery on this issue, or other appropriate remedies. Of course, post-judgment interest will also be required in accordance with 28 U.S.C. § 1961.

contributions by Defendant Bowater, Inc. for the purpose of adequately funding the Plan.

CONCLUSION

For the reasons given, a Final Judgment and Injunction shall enter granting Plaintiff's Motion for Class Certification, granting Plaintiff's Cross-Motion for Summary Judgment, denying Defendants' Motion to Dismiss, and granting in part and denying in part Plaintiff's requested equitable remedies. As a result, Defendants will be enjoined to utilize the correct methodology in claim calculation in the future as well as to recalculate lump sum claims paid in the past and to repay underpaid benefits with pre-judgment interest as individually calculated for past retirees whose lump sum benefits were incorrectly calculated.

/s/ Richard Alan Enslen

DATED in Kalamazoo, MI: November 26, 2002

RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE

TRUE COPY
SIGNED ORIGINAL FILED ELECTRONICALLY
Ronald D. Weston, Sr.., Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK J. CROSBY,
individually and on behalf of
all others similarly situated,

Case No. 1:01-CV-683

Plaintiff,

v. HON. RICHARD ALAN ENSLEN

BOWATER INCORPORATED
RETIREMENT PLAN FOR
SALARIED EMPLOYEES OF
GREAT NORTHERN PAPER, INC., and
BOWATER INCORPORATED,

Defendants.
_____/

FINAL JUDGMENT AND INJUNCTION

In accordance with the Opinion of this date;

IT IS HEREBY ORDERED that Plaintiff Frank J. Crosby's Motion for Class Certification (Dkt. No. 34) is **GRANTED** and the Court certifies the following class:

> All participants or beneficiaries of participants who received a lump sum distribution from the Plan (either directly or indirectly via transfer to an individual retirement account or other eligible retirement plan), or who are entitled to receive a lump sum distribution now or in the future (either direct or indirectly via transfer to an individual retirement account or other eligible retirement plan).

IT IS FURTHER ORDERED that Defendant Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper, Inc. and Defendant Bowater Incorporated's

Motion to Dismiss (Dkt. No. 6) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's Cross-Motion for Summary Judgment (Dkt. No. 17) is **GRANTED** and Judgment is entered in favor of Plaintiff and the Plaintiff Class, and against Defendants.

IT IS FURTHER ORDERED that Defendants Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper, Inc. and Bowater Incorporated, and their agents, employees and officers, are hereby enjoined to recalculate the lump sum benefits of class members who have previously received lump sum benefits, in accordance with the Court's Opinion, and to immediately refund under-payments, plus pre-judgment and post-judgment interest, as more particularly described in the Court's Opinion.

IT IS FURTHER ORDERED that Defendants shall provide financial data and records justifying their pre-judgment interest calculations to Plaintiff within 14 days of the payment of any under-payment.

IT IS FURTHER ORDERED that Defendants Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper, Inc. and Bowater Incorporated, and their agents, employees and officers, are hereby enjoined to calculate lump sum payments for class members who have not yet received any lump sum benefits in accordance with the Court's Opinion.

/s/ Richard Alan Enslen

DATED in Kalamazoo, MI:
November 26, 2002

RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE

TRUE COPY
SIGNED ORIGINAL FILED ELECTRONICALLY
Ronald D. Weston, Sr.., Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANK J. CROSBY,
individually and on behalf of
all others similarly situated,

Case No. 1:01-CV-683

Plaintiff,

v.

HON.RICHARD ALAN ENSLEN

BOWATER INCORPORATED
RETIREMENT PLAN FOR
SALARIED EMPLOYEES OF
GREAT NORTHERN PAPER, INC.,
AND BOWATER INCORPORATED,

Defendants. **OPINION**

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This matter is before the Court on Plaintiff Frank J. Crosby's Motion for Costs and Attorney Fees. Defendants Bowater IncorporatedRetirement Plan for Salaried Employees of Great Northern Paper, Inc. and Bowater Incorporated have opposed the Motion. The Motion has been fully and extensively briefed and the Court finds that further briefing or argument is unnecessary to resolve the Motion. For the reasons which follow, the Motion will be granted in part and denied in part.

BACKGROUND

This action was brought pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*

("ERISA"). On November 26, 2002, after very extensive legal briefing by the parties, this Court granted class certification, granted summary judgment in favor of Plaintiff, and awarded the Plaintiff class most of the equitable relief requested by Plaintiff's attorneys. On December 10, 2002, Plaintiff filed an Unopposed Motion for Enlargement of Time to File Motions for Costs and Attorney Fees. The Motion for Enlargement was later granted and Plaintiff then submitted its timely Motion for Costs and Attorney Fees for filing on January 7, 2003 consistent with the enlargement granted.[1]

Plaintiff's Motion for Costs and Attorney Fees seeks $270,640.00 of attorney fees through January 6, 2003, costs in the amount of $4,973.12 through January 6, 2003, and an unspecified amount of attorney fees and costs incurred after January 6, 2003. The attorney fees sought are based on the following lodestar calculations: $3,465.00 for Bradley J. Schram (7.70 hours times $450/hour); $29,707.50 for Robert P. Geller (69.90 hours times $425/hour); $5,925.00 for Bradford Yaker (15.80 hours times $375/hour); and $231,542.50 for Eva Cantarella (661.55 hours times $350/hour).

Plaintiff has documented his costs and attorney services through thorough attorney billing records (Plaintiff's Ex. 56) and affidavits for each of the attorneys (Plaintiff's Exs. 52-55.) The affidavits also detail the legal experience of each of the billing attorneys.

Attorney Bradley Schram is a graduate of Georgetown Law School and a former Assistant Prosecuting Attorney for Wayne County. (Plaintiff's Ex. 52.) He founded the law firm of Hertz and Schram (now Hertz, Schram & Saretsky, P.C.) in 1979. (*Id.*) His legal experience includes lecturing at both

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[1]On January [illegible] 2003, the Motion for Costs and Attorney Fees was submitted for filing together with an Unopposed Motion to File Excess Pages--in order to comply with Local Civil Rule 7. The lengthy brief was approved by Order of January 13, 2003 and the Motion for Costs and Attorney Fees was then entered on the docket on January 13, 2003.

University of Detroit School of Law and Wayne State University Law School on professional responsibility in litigation. (*Id.*) It also includes work on some eight federal ERISA class actions and numerous other security class actions. (*Id.*) His legal work in this case, according to the billing records, consists mostly of conferences with Eva Cantarella and Robert Geller concerning case strategy, and revisions of key documents, such as the Complaint. (*See* Plaintiff's Ex. 56.)

Robert Geller is a graduate of the Boston University School of Law and a former attorney for the United States Agency for International Development (where he worked in Mogadishu, Somalia negotiating government contracts). (Plaintiff's Ex. 53.) He returned to private practice in 1986. (*Id.*) He has at least eight years of experience in litigating ERISA class actions and has litigated or supervised eight federal ERISA class actions filed by his firm. (*Id.*) He also has significant experience in many other securities class actions and non-ERISA class actions filed throughout the country and is a member in good standing of the bar of the United States Supreme Court. (*Id.*) It appears from the firm billing records that his work in this case has consisted mostly of consulting with firm members about strategic litigation decisions and reviewing key documents, such as the Complaint. (*Id.*)

Bradford Yaker is a 1988 graduate of Wayne State University Law School and a partner of Hertz, Schram & Saretsky, P.C. (Plaintiff's Ex. 54.) Prior to joining the firm, he was a partner of the Chicago law firm of Keck, Mahin and Cate. (*Id.*) He has seven years experience litigating ERISA class actions and has prosecuted eight federal ERISA class actions in that time. (*Id.*) He also has extensive experience prosecuting other class actions involving securities, accounting malpractice, and consumer protection issues. (*Id.*) According to his Affidavit and the billing records, his involvement in this case has consisted of researching class certification issues and preparing pleadings in support of class certification. (Plaintiff's Ex. 54 & 56.)

Eva Cantarella is a 1994 graduate of Wayne State University Law School and a former member of the *Wayne*

State Law Review. (Plaintiff's Ex. 55.) Prior to law school, she owned and operated an appraisal services company which performed income property appraisals for financial institutions. (*Id.*) In 1994 and 1995, she worked for the firm of Pepper Hamilton & Sheetz in the practice of litigation. (*Id.*) In 1995, she began work as a litigation associate for Hertz, Schram & Saretsky, P.C. and, in that capacity, has worked on seven federal ERISA class actions. (*Id.*) She is a member in good standing of the bars of the Sixth Circuit Court of Appeals and the United States Supreme Court, and is a frequent lecturer on ERISA and employee benefits law. (*Id.*) The law firm billing records detail that she has done the lion's share of the litigation work in this matter, including conducting client contacts, reviewing evidence, researching legal issues, drafting legal documents including the Complaint, numerous motions, briefs, and proposed orders, and conferring with co-counsel regarding strategic litigation decisions. (Plaintiff's Ex. 56.)

Costs sought by Plaintiff includes court fees, charges for Westlaw and other electronic searches, delivery charges, mileage, parking fees and other miscellaneous small disbursements as detailed on the final page of the law firm billing records. (Plaintiff's Ex. 56.) These costs total $4,973.12. (*Id.*) The greatest percentage of these costs are for copying ($3,074.80).[2] (*Id.*)

Defendants have opposed the award of any attorney fees under ERISA given their analysis of the factors pertinent to such an award. They have also opposed the attorney fee rates charged by each of Plaintiff's attorneys as excessive. They have also opposed much of the attorney services billed by

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[2]The need for such copying is obvious from the docket, given the lengthy briefings and other papers submitted in this case and presumably copied to many persons involved in the case.

Plaintiff's attorneys as unnecessary and/or excessive[3] and in one case, a dual billing for the same 1.25 hours on December 21, 2002, as an outright mistake. They have also opposed the costs as excessive and maintain that some of the items of disbursements (and particularly legal research charges) should not be allowed since they are considered as part of attorney overhead and not a recoverable cost. Plaintiff contests each of the arguments made by Defendants (with the exception of the double billing of 1.25 hours on December 21, 2002, which is conceded to be a billing mistake).

The parties' briefing also focuses attention on past statements made by the attorneys. During a motion hearing on March 12, 2002, Magistrate Judge Ellen S. Carmody asked, "If plaintiff were to prevail, I assume he would be entitled to attorneys fees under ERISA?" Defense counsel Thomas Piskorski responded: "Yes. There is a fee-shifting provision in ERISA, your honor, that is correct." Plaintiff regards this an admission that attorney fees should be awarded if Plaintiff prevailed. Defendants regard the statements only as an admission that the ERISA statute allows attorney fees in some cases, but not an admission that an award is proper in this case.

Defendants also argue that Plaintiff has "basically conceded" that Defendants' legal position in this case was taken in good faith. (Brief in Opposition, at 5.) This argument is based on statements on pages five through seven of Plaintiff's Memorandum of Law. As pointed out by Plaintiff, though, this is a curious argument since the statements made on those pages argue that Defendants were culpable for ignoring expert actuarial opinions.

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[3]Defendants' objections to particular hours are stated both in their Brief in Opposition, at pages 15-19, and in attached Charts/Exs. 4-9.

LEGAL ANALYSIS

A. Legal Standards

Section 502 of ERISA, 29 U.S.C. § 1132, provides that "[i]n any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). This language has been interpreted by the Sixth Circuit as granting "substantial discretion" to the district court to grant or deny a request for attorney fees in an ERISA action. *Jordan v. Michigan Conf. of Teamsters Welfare Fund*, 207 F.3d 854, 860 (6th Cir. 2000); *see Schwartz v. Gregori M.D.*, 160 F.3d 1116, 1119 (6th Cir.1998). Before exercising this discretion under a fee-shifting statute, the district court is required to examine five factors:

1. The degree of the opposing party's culpability or bad faith;

2. The opposing party's ability to satisfy an award of attorney fees;

3. The deterrent effect of an award on other persons under similar circumstances;

4. Whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and

5. The relative merits of the parties' positions.

Schwartz, 160 F.3d at 1119 (quoting *Sec. of Dept. of Labor v. King*, 775 F.2d 666, 669 (6th Cir.1985)). The *King* factors are a useful tool in analyzing fee requests, but should be used flexibly by the district courts; no single factor is necessary or dispositive.

Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550, 558 (6th Cir.1987).

If an analysis of the *King* factors dictates an award of attorney fees, then attorney fees are calculated using the "lodestar" method of calculation, *i.e.*, determining a reasonable fee based on a reasonable hourly rate and a reasonable *810 number of hours of service. The lodestar method was aptly explained by the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983):

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.
>
> The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." S.Rep. No. 94-1011, p. 6 (1976). Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed

> to one's adversary pursuant to statutory authority." *Copeland v. Marshall*, 205 U.S.App. D.C. 390, 401, 641 F.2d 880, 891 (1980) (*en banc*) (emphasis in original).

Hensley, 461 U.S. at 433-34.

Reasonable hourly rates under *Hensley* mean the customary local attorney fee rates for attorneys of comparable experience and expertise with one notable exception. *See Hadix v. Johnson*, 65 F.3d 532, 536 (6th Cir. 1995). The notable exception is that certain cases, by their content and character, require the employment of "out-of-town specialists" to perform services not regularly performed by local attorneys. Id. Regarding such specialists, the Sixth Circuit has said:

> When fees are sought for an out-of-town specialist, courts must determine (1) whether hiring the out-of-town specialist was reasonable in the first instance, and (2) whether the rates sought by the out-of-town specialist are reasonable for an attorney of his or her degree of skill, experience, and reputation. *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768-69 (7th Cir. 1982); *Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983). A corollary of this rule is that judges may question the reasonableness of an out-of-town attorney's billing rate if there is reason to believe that competent counsel was readily available locally at a lower charge or rate. *Chrapliwy*, 670 F.2d at 769.

Id. at 535.

Adjudication of the lodestar fee does not end the fee analysis mandated by the Supreme Court. While there is a "strong presumption" that the lodestar represents a reasonable fee, pertinent circumstances may warrant an adjustment of the fee either upward or downward. *Bldg. Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1401-02 (6th Cir. 1995). A list of many of the factors pertinent to setting the lodestar fee and adjusting the fee was specified

long ago by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974). The *Johnson* factors have now become part of the settled law of lodestar analysis under both Supreme Court and Sixth Circuit decisions. These factors include:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Blanchard v. Bergeron, 489 U.S. 87, 91 n. 5 (1989) (citing *Johnson*); *see also Paschal v. Flagstar Bank*, 297 F.3d 431, 434-35 (6th Cir. 2002). Like the *King* factors, the *Johnson* factors are a "useful catalog" to consider when exercising statutory discretion. *Paschal*, 297 F.3d at 435. They are not die-hard requirements to be met.

Of course, as the Supreme Court has stated not once, but repeatedly, the resolution of a motion for attorney fees under a fee-shifting statute should not become a "second major litigation" itself. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 609 (2001) (quoting *Hensley*, 461 U.S. at 437 and *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1988)). For this reason, the Sixth Circuit has determined that the district court should have substantial discretion in determining whether to conduct an evidentiary hearing on attorney fee motions. *Bldg. Serv. Local 47*, 46 F.3d at 1402. Consistent with this discretion, the Sixth Circuit only requires an evidentiary hearing on an attorney fee dispute when an evidentiary hearing is timely

requested and when the district court is unable to resolve material factual disputes based on the affidavits and written documentation submitted. *Id.* (citing authorities). In this case, an evidentiary hearing has not been requested. Moreover, even had it been requested, it would have been denied because the disputes between the parties can be readily resolved based on the written materials submitted.

B. Entitlement to Fees and Costs

As explained above, the Court must assess under the *King* factors, and other pertinent information, whether to award attorney fees and costs. Plaintiff's argument that the Defendants should be deemed to have admitted the entitlement misses the mark. The question by Magistrate Judge Carmody was designed to elicit whether there was a fee-shifting statute, not an entitlement to fees. Thus, the Court reads the answer, consistent with Defendants' explanation, as only a confirmation of the pertinency of the statute. Likewise, Defendants' argument that Plaintiff's brief "basically concedes" the "good faith" nature of the defense is mistaken. The whole of Plaintiff's statements, when read in context, dispute the reasonableness of Defendants' positions in this case.

In terms of the *King* factors, the Court first finds that Defendants exercised a sufficiently high degree of fault so as to be judged "culpable." This finding is based on the fact that Defendants' position contradicts most, if not all, learned actuaries (including Defendants' own actuary, Hewitt Associates) who have studied this issue and counseled against the use of a pre-mortality decrement in this context. From this standpoint, Defendants' position was more than slightly unreasonable. This is true despite that there was no binding precedent in the Sixth Circuit. The absence of precedent, though a brute fact, will not excuse the taking of positions which on their face are unreasonable and can be defended only by a sophist's resort to linguistic sleight-of-hand.

Furthermore, as argued by Plaintiff, Defendants took other positions in this suit, especially on class certification, which were not even remotely reasonable. Defendants originally contended[4] that Plaintiff did not meet the numerosity requirement for the class because it was not sufficiently shown that more than a small number of class members would elect to receive pension benefits in a lump sum. At the time, such a contention was known or should have been known to be false simply because empirical studies of pension plan participants have shown (as one would expect) that they usually take their benefits in a lump sum. Since the resolution of the class certification issue, Defendants in answering discovery requests have admitted that 463 out of 473 known pensioners have taken their benefits in a lump sum as opposed to an annuity. Thus, in the Court's judgment, Plaintiff has shown sufficient culpability on behalf of Defendants, both as to the positions taken in advance of litigation and in litigation.

As for the second King factor, Defendants have expressly admitted that they have funds sufficient to pay attorney fees. Therefore, the Court finds consistent with this concession.

As for the third *King* factor, the deterrent effect of an attorney fee award warrants an award of attorney fees. Without this deterrent effect, plan trustees might opt to use the improper discount in hopes of not being caught (especially since this is a highly technical matter which is not apparent to pensioners, with the exception of actuaries experienced in pension administration). The award also is important for the purpose of fairly compensating the class. Without the award, the class members' legitimate expectations of complete pension benefits (without the improper decrement) would be

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[4]Defendants abandoned this contention after being confronted with their own statement to the Internal Revenue Service and the Department of Labor that they assumed that all participants would take benefits in the form of a lump sum.

unnecessarily frustrated by the payment of the attorney fees themselves.

As for the fourth *King* factor, since this is a class action affecting nearly all pensioners of the Defendant pension fund and the Plaintiff has sought and secured a common benefit for those pensioners, it is very apparent that this case was pursued to secure a common benefit for a large number of class members. It is also apparent since Defendants have attempted to justify their conduct based on a lack of binding case precedent that the resolution of this question is important both for the pensioners affected and the pensioners of any other plans following similar practices. Therefore, the Court determines that both the common benefits sought and the significance of the legal question favor an award of attorney fees.

As for the fifth *King* factor, in terms of the relative merits of the parties' position, as reflected in the Court's Opinion of November 26, 2002, this factor clearly favors Plaintiff. Additionally, the Court notes that since its ruling, the Treasury Department has also proposed regulations which will direct the computation of pension compensation for cash balance plans without the offending decrement. See Proposed Rules, Department of Treasury, Reductions of Accruals and Allocations because of the Attainment of any Age; Application of Nondiscrimination Cross-Testing Rules to Cash Balance Plans, 67 Fed.Reg. 76123, 76133 ex. 5 (Dec. 11, 2002).

Accordingly, the Court determines that all King factors favor the award of attorney fees. As such, attorney fees will be awarded to Plaintiff's counsel.

C. Calculation of Lodestar Amount

1. Reasonable Attorney Rates

Defendants first argue in their briefing that Plaintiff has failed to justify the rates sought, citing to this Court's earlier decisions in *Holford v. Exhibit Design Consultants*, 218 F.Supp.2d 901, 910 (W.D.Mich.2002) and *Swans v. City of*

Lansing, 65 F.Supp.2d 625, 647 (W.D.Mich. 1998). Both of those decisions significantly reduced attorney fee rates and fees based on the Sixth Circuit's holding in *Hadix*, 65 F.3d at 535, described above.

As argued by Plaintiff, this comparison ignores the pertinent facts of both this case and the cited cases. *Holford* was a very simple *ERISA* claim (failure to provide a mandated notice) which could have been easily prosecuted by cheaper local counsel. *Swans* was a civil rights brutality case typical of many other cases filed by local attorneys. In neither of those cases was there any need to employ either high priced local counsel or an out-of-town specialist to perform the duties of the plaintiff counsel.

In this case, in contrast, the suit involves a highly technical ERISA claim based on the nature of actuarial assumptions made in computing pension benefits. Defendants themselves employed out-of-town specialists (the Chicago law firm of Seyfarth Shaw) to defend the action. While there are a small number of attorneys in the Western District of Michigan with some expertise in this area, in the Court's experience, these attorneys all work on behalf of employers and pension plans.[5] None of these attorneys, in the Court's experience, has any experience or expertise in prosecuting actions on behalf of plaintiffs and none has any experience in prosecuting class actions. Therefore, appointment of "out-of-town specialists" was necessary in this case because local attorneys were not available to provide the necessary services. The type of speciality services needed in this case are provided only by a small number of specialty law firms which, almost exclusively, are located in large metropolitan areas. Plaintiff's attorneys are an example of such a firm.

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[5]I was appointed to the bench in 1979. Before that, I began my legal practice in Western Michigan in 1958 and am well familiar with the firms and attorneys practicing in Western Michigan by virtue of long experience.

Defendants have also argued that Plaintiff's counsel should be limited to the rate of $220 per hour. Defendants justify this rate based on related arguments. One of these arguments is that Plaintiff's attorneys' billing rates for hourly clients are in fact lower than the rates requested. Another related argument is that the $220/hour rate was determined as the appropriate rate by the Northern District of Illinois as to the same attorneys in the ERISA case of *White v. Employee Ret. Plan of Amoco Corp.*, 2001 WL 1204193 (N.D.Ill. Oct. 10, 2001).

Plaintiff's attorneys do not disagree that their hourly rates for corporate clients are lower. However, they argue that those rates (whatever they are) are irrelevant because the services provided are of an essentially different character, *i.e.*, those services involve simple advice on individual corporate decisions, they do not involve the issues at interest in this suit, and they do not involve the prosecution of plaintiff class claims. The Court finds this reasoning persuasive and will not limit Plaintiff's billing rate by use of an artificially lower rate which is not pertinent to the services at issue.

As for the rate chosen in *White*, Plaintiff's attorneys characterize this rate as of minimal importance because *White* was decided on a common fund theory of recovery as opposed to a lodestar analysis. Moreover, Plaintiff's attorneys also argue that the use of the *White* rate would be greatly unfair given the substantial inflation of attorney costs/fees which have occurred between the time services were rendered in *White* and the time services are to be rendered in this case. The Court concurs with both of these arguments and, therefore, will not artificially limit Plaintiff's attorney fees to the rates awarded in *White*.

As for the *Johnson* factors, the Court will address each of the Johnson factors through separate findings.

First, substantial time and attorney services were necessary to prosecute this case. As with all class actions, this case involved substantial effort in identifying class members and following the procedures under Rule 23 for the certification of the class. As with all complicated cases driven by actuarial issues, this case involved complex and technically

skilled work in addressing the actuarial issue. As with all major ERISA litigation, this case involved detailed argument about the pertinent statutory authority for the relief sought. For all of these reasons, the Court finds generally that the time and labor expended by Plaintiff's attorneys were wholly necessary.

Second, for the reasons explained above, this case is best described as a highly difficult and novel case.

Third, for the reasons given above, this case necessitated an extremely high-level of attorney skill (*i.e.*, within the top five percent of the national bar), which services were ably provided by Plaintiff's counsel.

Fourth, consistent with the statements of Plaintiff's counsel, the appearance of Plaintiff's counsel in this case precluded Plaintiff's counsel from engaging in other lucrative work.

Fifth, the customary fees for such work are best represented by the hourly rates for high-quality, major-metropolitan defense firms who regularly defend these kinds of cases (simply because the relevant plaintiff firms work on a contingency basis and not on an hourly-fee basis). The rate for eight-year associates of those firms (*i.e.*, persons with "comparable experience" to attorney Cantarella) are between $300 to $400 per hour. Therefore, the Court will select the rate of $300/hour as the appropriate rate for attorney Cantarella. The rate for partners of those firms are between $300 to $600 per hour depending on the firm, the experience and the services rendered. Therefore, the Court selects the rates of $325/hour for attorney Yaker, $375/hour for attorney Geller, and $400/hour for attorney Schram as appropriate rates for their experience and expertise. While these rates are less than those requested by Plaintiff, they are adequate to fairly compensate Plaintiff's counsel.

Sixth, Plaintiff's took this case on a contingent fee basis. Therefore, the contingency serves to justify the high fees discussed above.

Seventh, this case did not involve unusual time limitations.

Eighth, this case involves an estimated $2.7 million dollars, according to Defendants' last estimate. Therefore, the amounts at stake are sufficient to justify excellent representation at the rates described above.

Ninth, Plaintiff's attorneys have excellent experience, reputations and abilities, as proven not only by their work in this case, but in many other federal class actions. Therefore, this factor supports the rates discussed above.

Tenth, while this case was desirable from the aspect that the legal claims were likely to succeed, the lack of a controlling precedent made the case more difficult for Plaintiff. Therefore, the Court considers this a mixed factor which does not greatly impact on the fee analysis.

Eleventh, Plaintiff and Plaintiff's counsel had no relationship prior to this suit. Their relationship is confined to representation in this suit. This factor does not significantly affect the analysis of either fees or rates.

Twelfth, awards in similar cases support the rates described above. Plaintiff has composed a chart of similar cases in which high rates were awarded (Chart B). The chart supports the rates described above, notwithstanding the fact that Plaintiff's attorneys themselves have not always been awarded such high rates (as in the *White* case). The other "comparable" cases cited by Defendants are not comparable and do not bear on the appropriate rates for this case.

Therefore, for the reasons given, the Court will award rates of $300/hour for attorney Cantarella, $325/hour for attorney Yaker, $375/hour for attorney Geller, and $400/hour for attorney Schram.

2. Reasonable Hours of Service

As stated above, the Court generally agrees that the total amount of attorney hours claimed was reasonably necessary given the legal tasks incumbent upon class counsel and given the serious opposition made by defense counsel. With this said, however, the Court will also address the particular objections made by Defendants to hours of service

by Plaintiff's counsel.

It is conceded by Plaintiff's counsel that Plaintiff's counsel erroneously twice billed 1.25 hours for memorandum preparation by attorney Cantarella on December 21, 2002. Therefore, the second 1.25 hours will be stricken as mistaken.

Defendants have challenged the total hours billed as excessive on the ground that the legal issues in this case largely overlapped with those in another of Plaintiff's cases (*Lyons v. Georgia-Pacific Corp.*, 196 F.Supp.2d 1260 (N.D.Ga.2002) (unpublished)). In fact, Defendants have attached copies of underscored briefing for the purpose of showing that briefing done in this case was, in some instances, "recycled" from *Lyons*. Of course, this Court is not interested in the exact process used to create briefing, whether it be recycling or creation *ab initio et ex nihilo*. The Court is interested, however, in carefully regarding the billing of hours on briefing to determine whether the hours billed were excessive in light of the services provided. In assessing this, the Court does take into account that the repetition of briefing previously completed is not an arduous task. While this is plain, it is also plain that the facts of each and every ERISA case involving distinct plans are distinct. Therefore, even when briefing can be recycled, its recycling still involves significant numbers of attorney hours to tailor it and to ensure that the recycled briefing is factually accurate and legally pertinent to the circumstances of the present law suit. For those reasons, the Court finds that the hours billed by Plaintiff's attorneys for completing briefing in this matter were not overstated.

In making the above finding, the Court also finds that the briefing was of a very high quality and greatly assisted in the resolution of the case. For the same reasons, the Court finds that the hours spent on the various briefs submitted were not overstated. These findings are consistent with the directions of the Sixth Circuit and Second Circuit in the cases of *Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169,1177 (6th Cir. 1990) and *Grant v. Martinez*, 973 F.2d 96, 99 (2nd Cir.1992). Those cases make clear that in assessing attorney fees, the district court should assess whether the hours of service were

deemed necessary at the time they were performed. The district court should not engage in an "*ex post facto* determination of whether attorney hours were necessary to the relief obtained." *Grant*, 973 F.2d at 99 (citing *Wooldridge*). "The relevant issue ... is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Id.* Defendants' criticisms suffer inappropriate ex post facto thinking. The many hours expended in briefing were necessary because a reasonable attorney would have engaged in similar time expenditures at the time.

Defendants have also objected to the number of hours billed in seeking attorney fees. Plaintiff has billed as much as 108.30 hours in the process of seeking attorney fees and costs. (*See* Plaintiff's Reply, at 23 n. 8; Defendants' Ex. 9, Chart F.) This is very large considering that Plaintiff only billed 636.1 hours in obtaining the relief ordered. The Sixth Circuit in *Coulter v. Tennessee*, 805 F.2d 146, 151 (6th Cir. 1986) announced a general rule that attorney fee hours in seeking attorney fees in lodestar cases are allowed, but only up to 3 percent of the total hours billed in obtaining relief. To the contrary, Plaintiff argues that this rule should be limited to civil rights cases, such as *Coulter*, and not be applied outside that context. This interpretation of *Coulter* is unduly limiting because the rationale in *Coulter* applies equally to attorney fee petitions filed under statutes other than 42 U.S.C. § 1983. Therefore, the Court will reduce these hours to the three-percent limit or 19.1 hours. The Court will do so by reducing attorney Geller's 8.3 hours on attorney fee issues to 2.5 hours and reducing attorney Cantarella's 100 hours on attorney fee issues to 16.6 hours.

Defendants have objected to the hours billed by attorney Schram, which were mostly consulting hours. Defendants argue that Schram served only as the overseer of an overseer (referring to attorney Geller's supervision). Defendants' argument overlooks the value served by office consultations between junior and senior attorneys. These kind

of office consultations alert less experienced attorneys to litigation pitfalls and save both the federal courts and many parties avoidable legal problems and the unnecessary expenditure of resources. They also ensure (as argued by Plaintiff) that technical arguments are appropriately "packaged" so as to be readable by non-actuaries, including judges of the federal courts. While in this case two senior attorneys were involved with oversight and consultation, their hours were relatively modest in light of the services rendered. In particular, attorney Schram billed only 7.7 hours. Such hours were an appropriate exercise of billing judgment and should not be stricken as unnecessary. *See Hensley*, 461 U.S. at 433-34; *see also Rodriguez ex rel. Kelly v. McLoughlin*, 84 F.Supp.2d 417, 426 (S.D.N.Y. 1999) (permitting attorney fees for office conferences by multiple attorneys); *Meriwether v. Coughlin*, 727 F.Supp. 823, 826-27 (S.D.N.Y. 1989) (approving similar attorney fee billings).

Defendants further maintain that 23 hours spent by attorney Cantarella in traveling to the Society of Actuaries and in researching actuarial issues there was unnecessary. Defendants suggest that attorney Cantarella could have simply called the Society and had relevant documents shipped to her office, thereby avoiding the travel. As explained by attorney Cantarella, her travel was necessitated by the fact that the Society does not conveniently catalogue all its materials and does not identify requested materials during telephone inquiries (which attorney Cantarella first tried before traveling to the Society). The information learned was very pertinent and the travel at issue was wholly justified. Therefore, Defendants' argument on this point is emphatically rejected.

To summarize, Plaintiff's counsel will be allowed the following hours of service as time reasonably expended in this litigation: 576.9 hours for attorney Cantarella; 64.1 hours for attorney Geller; 7.7 hours for attorney Schram; and 15.80 hours for attorney Yaker. The Court regards those hours when multiplied by the allowable rates described above as a proper lodestar fee for Plaintiff's attorneys. According to the Court's calculations, this results in lodestar fees of: $173,070 for

attorney Cantarella; $24,037.50 for attorney Geller; $5,135 for attorney Yaker; $3,080 for attorney Schram; and a total lodestar attorney fee of $205,322.50.

While the Court will allow such hours of service, the Court rejects Plaintiff's suggestion (on page 27 of their Memorandum of Law in Support) to allow later billed fees based on subsequent verification of those hours by Plaintiff's attorneys without review by the Court. Due process does not permit the writing of such a blank check because such amounts (even if proper) would not be subject to legitimate challenge by Defendants and would not be independently reviewed and assessed by the District Court as required by section 502 of ERISA. *See also United States v. Bowers,* 828 F.2d 1169, 1175 (6th Cir. 1987) (warning about the writing of a judicial "blank check"). Therefore, this latter request by Plaintiff is rejected.

D. Costs

Defendants have also contested that the $4,973.12 sought by Plaintiff are not allowable costs, with the exception of the filing fee, which is conceded. Defendants argue that Plaintiff has not sufficiently documented the costs incurred. To address this concern, Plaintiff has filed an updated statement of costs (Ex. 65) which documents that telephone charges, copying, delivery charges, et cetera were made in connection with court filings in this case. Even without this documentation, the Court would be inclined to grant all such costs since exactly those kinds of costs are routine and expected costs of maintaining representation in this kind of suit. Based on the material submitted, the Court finds that the costs have been sufficiently documented by Plaintiff and were reasonably and necessarily incurred in this litigation.

Defendants have also objected to Westlaw charges, citing unpublished decisions which hold that Westlaw charges should not be allowed. Plaintiff has responded by citing to decisions by the Third, Seventh, Tenth and D.C. Circuits allowing on-line charges as reasonable costs. *See, e.g.,*

Continental Illinois Securities Litigation v. Continental Illinois Corp., 962 F.2d 566, 570 (7th Cir. 1992); *Case v. Johnson County, Kansas*, 157 F.3d 1243, 1258 (10th Cir. 1998). The logic of those cases is irrefutable. They treat Westlaw charges, like paralegal expenses, as an expense which is routinely billed to clients and which is necessary and proper in the studied practice of law. A contrary rule would only discourage the use of on-line research and would make the legal practice both more costly and less effectual. Therefore, these charges will be allowed as proper costs. In reaching this ruling, the Court also relies on the Sixth Circuit's decision in *Northcross v. Bd. of Educ.*, 611 F.2d 624, 638-39 (6th Cir.1980), which allowed costs, including paralegal fees, as part of reasonable attorney fees because such costs are routinely charged by attorneys as part of their effective practice of law.

As such, Defendants' objections to costs are wholly overruled.

CONCLUSION

For the reasons given, an Order shall enter awarding attorney fees and costs in the amount of $210,295.62 in favor of Plaintiff and against Defendants.

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE

DATED in Kalamazoo, MI:
May 20, 2003

TRUE COPY
SIGNED ORIGINAL FILED ELECTRONICALLY
Ronald D. Weston, Sr.., Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2004 FED App. 0303P (6th Cir.)
File Name: 04a0303p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Frank J. CROSBY, individually and on behalf of all others similarly situated,		No. 03-1044
Plaintiff-Appellee,		
v.		
BOWATER INCORPORATED RETIREMENT PLAN FOR SALARIED EMPLOYEES OF GREAT NORTHERN PAPER INC. and BOWATER, INCORPORATED, *Defendants-Appellants.*		

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids
No. 01-00683--Richard A. Enslen, District Judge

Argued: April 20, 2004

Decided and Filed: September 9, 2004

Before: BOGGS, Chief Judge; NELSON and SUTTON, Circuit Judges.

COUNSEL

ARGUED: Thomas J. Piskorski, SEYFARTH SHAW, Chicago, Illinois, for Appellants. Eva T. Cantarella, HERTZ, SCHRAM & SARETSKY, Bloomfield Hills, Michigan, for Appellee. **ON BRIEF:** Ian H. Morrison, SEYFARTH SHAW, Chicago, Illinois, for Appellants, Eva T. Cantarella, Bradley J. Schram, Robert P. Geller, Bradford T. Yaker, HERTZ, SCHRAM & SARETSKY, Bloomfield Hills, Michigan, for Appellee.

OPINION

DAVID A. NELSON, Circuit Judge. This appeal shows that the distinction between law and equity can still have consequences. ("The forms of action we have buried," Maitland observed in a very different context, "but they still rule us from their graves."[1])

The plaintiff, a participant in a retirement plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, claimed that the plan administrator had acted improperly in using a pre-retirement mortality discount factor when calculating lump sum pre-retirement benefits. As a result, the plaintiff asserted, he was paid a benefit that fell $5,249.08 short of what he was entitled to receive. Invoking § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3),[2]

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[1]F.W. Maitland, The Forms of Action at Common Law 2 (A.H. Chaytor & W.J. Whittaker eds., 1948).

[2]As codified in Title 29 of the U.S.Code, ERISA § 502(a)(3) provides as follows:

"A civil action may be brought--

* * *

and purporting to act on behalf of a class of approximately 350 plan participants said to be similarly situated, the plaintiff brought suit against the plan and its administrator for what he described as "equitable and injunctive relief." At the heart of the plaintiff's prayer for relief was a request for recovery of additional lump sum benefits.

After a wave of motions had been filed, the district court entered an order granting class certification, granting summary judgment in favor of the plaintiff and the class, ordering a recalculation of lump sum pre-retirement benefits without the mortality discount, and requiring the defendants "to immediately refund [the] under-payments...."

For the district court to order the defendants to "refund" (*i.e.* to pay) the difference between the amount calculated without a mortality discount and the amount actually received was to grant a form of relief not typically available in equity. Such relief, we conclude, was thus not available under the statutory provision on which the plaintiff elected to base his action. See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), and *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993).

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(3) by a participant, beneficiary, or fiduciary (A) *to enjoin* any act or practice which violates any provision of this subchapter or the terms of the plan, *or* (B) *to obtain other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3) (emphasis supplied).

A separate provision, § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), authorizes a participant to bring suit "to recover benefits due to him under the terms of his plan...." The plaintiff in this case did not invoke § 502(a)(1)(B).

If we assume, for purposes of analysis, that the defendants had no discretion to use the mortality discount factor in making the benefit calculation, the fact remains that ERISA § 502(a)(3), which authorizes only suits for injunctive or other equitable relief, does not, in most situations, authorize an action for money claimed to be due and owing. An action in which the plaintiff complains that the defendant owes him money and has refused to pay the debt is, of course, the *locus classicus* of an action at law; if we were to say that such an action qualifies as a suit in equity, we should be giving the words used by Congress in § 502(a)(3) a meaning that *Great-West* and *Mertens* teach they will not bear. The challenged judgment will therefore be reversed.

I

The individual plaintiff, Frank J. Crosby, was a participant in an ERISA retirement plan administered by defendant Bowater Incorporated, the parent corporation of Mr. Crosby's sometime employer, Great Northern Paper, Inc. Before he reached his normal retirement age, but after his pension rights had vested, Mr. Crosby lost his job as a result of Great Northern's having been sold to another company. The termination of Mr. Crosby's employment accelerated his right to receive benefits under the retirement plan.

The Bowater plan was of the "cash balance" variety, a species of the "defined benefit" genus. The plan gave Mr. Crosby a hypothetical "Personal Account," and his benefits were to be a function of the balance in that account. The balance reflected credits geared to Mr. Crosby's monthly compensation and a specified rate of interest. The Personal Account was nothing more than a computational construct, and benefits were to be paid from the plan's general assets.

If Mr. Crosby had been able to retire from Great Northern at age 65--the "normal retirement age" specified in the plan--a joint-and-survivor annuity would have been

payable as long as he or his wife continued living. The amount of the annuity would have been determined by taking the balance in Mr. Crosby's Personal Account at age 65 and dividing it by a prescribed annuity factor. And had Mr. Crosby died before age 65 while still employed by Great Northern, a death benefit would have been payable in an amount equal to the then present value of his accrued retirement benefit.

When Mr. Crosby ceased to be an employee of Great Northern, not having retired or died on the job, he became eligible, under the terms of the plan, for a distribution of his retirement benefit. Mr. Crosby, who was 43 years old at the time, elected to take his distribution in a lump sum.

Bowater, as plan administrator,[3] told Mr. Crosby that the lump sum would be $48,732.14. That was the balance in Crosby's Personal Account. (Article XII of the plan provided that a participant's accrued benefit could only be distributed in a form of payment selected by the participant from a list of options incorporated in § 12.2 of the plan. The second option, set forth in § 12.2(b), was "[a] single lump sum payment equal to the amount credited to the Participant's Personal Account as of the end of the month preceding his Benefit Commencement date.")

Claiming that the relevant statutory law, as interpreted by the Internal Revenue Service in IRS Notice 96-8 (IRB 1996-6, Feb. 5, 1996), entitled him to receive more than the amount credited to his Personal Account, Mr. Crosby asked Bowater to recompute his lump sum by (1) projecting interest credits to normal retirement age, (2) dividing the resultant age-65 account balance by the annuity factor prescribed in the plan, and (3) discounting the age-65 annuity to its present value.

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[3]Except where the context indicates otherwise, all references in this opinion to "Bowater" should be read as meaning Bowater in its plan-administrator capacity.

Bowater acceded to this request, notwithstanding that the Internal Revenue Service had approved the plan provision pegging the lump sum entitlement to the amount credited to the participant's Personal Account. Mr. Crosby was advised that his claim for a larger benefit had been granted and that his lump sum entitlement had been recalculated. The resulting figure was $52,013.90. We presume that this amount was paid in full.

In a detailed explanation of how it arrived at the $52,013.90, Bowater told Mr. Crosby, among other things, that it had used a pre-normal-retirement-age mortality discount factor in its present-value calculation. When it determined the present value of an age-65 annuity, in other words, Bowater took into account the possibility that Mr. Crosby might die before reaching the age at which he would be entitled to start receiving annuity payments.

Mr. Crosby objected to the use of the mortality discount factor, filing an appeal with Bowater in which he made the following argument:

> "This discount factor is not consistent with the calculation method described in IRS Notice 96-8. Further, I believe this discount reduces my accrued benefit, and, thus, is not allowed under ERISA."

Bowater's Pension Administration Committee denied the appeal, issuing a five-page explanation of its decision to do so.

Mr. Crosby then sued the Bowater plan and Bowater Incorporated in the United States District Court for the Western District of Michigan. The complaint alleged, among other things, (1) that "when Bowater discounted Crosby's age-65 annuity to present value, it should not have used a mortality discount for the period *before* normal retirement age;" (2) that "[i]f Bowater had utilized the . . . mortality discount factors for the period *after* normal retirement age only,

Crosby's lump sum entitlement . . . would have been $57,262.98" instead of the $52,013.90 produced by the method Bowater in fact used; and (3) that "Bowater's use of a mortality discount for the period *before* normal retirement age caused a partial forfeiture of Crosby's accrued benefit, thereby violating ERISA § 203(a), 29 U.S.C. § 1053(a)."[4]

The complaint stated that Mr. Crosby brought his claim "under ERISA § 203(a), 29 U.S.C. § 1053(a), and the enabling statute, ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)." As noted above, Mr. Crosby did not bring his claim under ERISA § 502(a)(1)(B)--the section that authorizes a party to sue for "benefits due to him under the terms of his plan...." (Under the language of the plan, Mr. Crosby was entitled to less than he had already been paid--a circumstance that explains the decision not to invoke § 502(a)(1)(B).[5])

The complaint alleged that approximately 350 plan participants or beneficiaries were in the same boat as Mr. Crosby--*i.e.*, they were victims of Bowater's insistence on use of a mortality discount factor for the period before normal retirement age. Joinder of such a large number of individuals

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[4]Section 203(a) sets forth rules on the extent to which accrued benefits are nonforfeitable. As Mr. Crosby subsequently reiterated in a brief filed with the district court, "Crosby's claim is for violation of ... the anti-forfeiture rules under ERISA § 203(a)."

[5]In his brief on appeal, Mr. Crosby tells us that he "*could not bring his claim under ERISA § 502(a)(1)(B)* because the Plan's lump sum provision contemplates payment of an amount equal to the participant's Personal Account ..., the amount Bowater initially offered Crosby. Consequently, if Crosby *had* brought his claim under § 502(a)(1)(B), he would be entitled to no relief at all...." We intimate no view as to whether this proposition is correct.

was said to be impracticable, and the complaint stated that Mr. Crosby "seeks both equitable and injunctive relief for the Class, as permitted under ERISA § 502(a)(3)."

The complaint's prayer for relief asked the court to enter a judgment ordering the defendants to "[r]e-compute any and all lump sum benefits previously paid," using the methodology followed in the recomputation of Mr. Crosby's lump sum entitlement "*but without any mortality discount for the period before normal retirement age.*" The court was further asked to (1) order the defendants to "[p]ay all Plan participants or their beneficiaries who previously received a lump sum distribution . . . the difference between the amount [so] computed . . . and the lump sum amount the participant or beneficiary received from the Plan, plus pre-judgment and post-judgment interest on this amount;" to (2) "[e]njoin defendants from utilizing a mortality discount for the period before normal retirement age when computing a lump sum distribution from the Plan in the future;" and to (3) order the defendants to "[p]ay . . . reasonable attorney's fees and costs . . ." The prayer for relief also included a request that the court "impose a constructive trust over the amount of plan assets necessary to pay the amounts determined . . . and award any other equitable relief this Court deems appropriate."

The defendants responded to the complaint with a motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P. The first and second numbered paragraphs of the defendants' motion read as follows:

> "1. Crosby purports to bring this action under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ('ERISA'), 29 U.S.C. § 1132(a)(3), and styles it as an action to enforce Section 203(a)(2)(A) of ERISA.
>
> 2. Crosby sues to recover an increased lump sum distribution of his retirement benefit under the Plan, a retirement benefit plan sponsored and administered by

> Bowater. In particular, Crosby claims that in calculating the present value of his retirement benefit, defendants incorrectly used a mortality discount for the part of that calculation dealing with the time before Crosby had reached age 65."

The brief accompanying the motion pointed out that the statutory provision on which Mr. Crosby purported to sue did not authorize a suit for the relief he was seeking:

> "Although what he really seeks is an award of additional benefits, a claim properly brought under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) [footnote omitted], Crosby purports to sue under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). That provision only authorizes Crosby to bring an action to 'enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan.' "

Mr. Crosby filed a response to the 12(b)(6) motion in which he admitted the substance of paragraphs 1 and 2 of the motion:

> "1. Crosby agrees that he brought this action under § 203(a)(2) and § 502(a)(3) of the Employee Retirement Income Security Act ('ERISA'). 29 U.S.C. § 1053(a)(2) and 29 U.S.C. § 1132(a)(3).
>
> 2. Crosby agrees that (a) he is suing to recover additional lump sum benefits; (b) the Plan is sponsored and administered by Bowater; and (c) he claims that Bowater incorrectly utilized a mortality discount for the period before age 65 when it computed his lump sum."

The response was accompanied with a cross motion for summary judgment based on the complaint as filed; at no time

did Mr. Crosby seek leave to amend the complaint.

In due course, after Mr. Crosby had filed a motion for class certification, the district court ordered briefing on the appropriateness of the requested equitable remedies in the event the plaintiff succeeded on his summary judgment motion. In the brief filed pursuant to the court's direction, Mr. Crosby reiterated he had brought his claim under § 502(a)(3), "which authorizes 'appropriate equitable relief.' " Arguing that the relief he sought was "equitable" as well as "appropriate," Mr. Crosby cited *Great-West Life & Annuity Ins. Co. v. Knudson*, 634 U.S. 204 (2002), as "suggest[ing] that if the relief requested does not seek to impose liability for a *contractual* monetary obligation, it is probably an appropriate equitable remedy." The district court was told that "Crosby does not seek to impose liability on defendants for any contractual obligation to pay money."

After the completion of briefing, and having dispensed with oral argument, the district court entered a final judgment in which the court granted class certification; denied the defendants' motion to dismiss; granted the plaintiff's summary judgment motion; enjoined the defendants "to recalculate the lump sum benefits of class members who had previously received lump sum benefits, in accordance with the Court's Opinion, and to immediately refund under-payments, plus pre-judgment and post-judgment interest;" and to "calculate lump sum benefit payments for class members who have not yet received any lump sum benefits in accordance with the Court's Opinion."

The opinion itself--a comprehensive and well-crafted analysis of a variety of issues, some of which are not in contention on appeal--reasoned that because the plan provided for payment of a pre-retirement death benefit in the amount of the then-vested present value of the participant's accrued benefit, the death benefit was not "incidental" to the participant's accrued benefit and the plan administrator thus

lacked discretion to use a mortality discount factor in reducing the projected age-65 annuity to its present value. The bottom line, in the district court's view, was that the lump sum payment to which Mr. Crosby claimed to be entitled--$57,262.98, as the court noted--should not have undergone the mortality reduction that resulted in a lump sum payout of only $52,013.90.

The defendants perfected a timely appeal. Much of the argument they present to our court is a defense of the merits of the plan administrator's decision to take pre-retirement mortality risk into account. The defendants argue further that the decision should have been reviewed under an arbitrary-and-capricious standard, and that the district court was required to uphold the decision as reasonable. We do not reach these issues, because--as the defendants also argue--the primary relief sought by Mr. Crosby did not qualify as "equitable relief" of the sort authorized by ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

II

The present opinion is not the place for a history lesson on the development of the parallel systems of jurisprudence known as "law" and "equity." It will suffice, we trust, to remind the reader that courts of law--in which the common law of the English speaking peoples had its principal growth--were for a number of centuries separate and distinct from chancery courts (originally the court of an ecclesiastical person appointed by the king to be his chancellor); that the rules of decision followed in chancery courts were not common law rules, but rules of equity; that chancery courts (i.e. courts of equity) likewise had their own procedures--procedures under which, for example, the chancellor performed the fact-finding role that in courts of law would be performed by a jury; and that the remedies typically available to a party who prevailed in a court of equity (injunctive relief, e.g.) were far from identical to the remedies

the prevailing party could obtain in a court of law. Although, in most jurisdictions, the same courts have long administered both law and equity,[6] the unified courts have been administering what Professor Geldart described as "distinct bodies of law, governed largely by different principles."[7]

Against this background, we return to the text of ERISA § 502(a)(3), the statutory section under which plaintiff Crosby brought his suit. Under § 502(a)(3), as codified at 29 U.S.C. § 1132(a)(3), Mr. Crosby could institute a proceeding "(A) to enjoin any act or practice which violates [ERISA] or the terms of the plan, or (B) to obtain other appropriate *equitable* relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan." (Emphasis supplied.) Section 502(a)(3) does not authorize a plan participant to sue for recovery of benefits due to him under the terms of the plan. That is the office of § 502(1)(B)--a section with which Mr. Crosby has always insisted he will have nothing to do.

But what if the benefits are not claimed to be due under terms of the plan, strictly speaking, but under the terms of a statute--in this case ERISA § 203(a), 29 U.S.C. § 1053(a)--setting forth requirements that the plan must satisfy? The answer, we believe, depends on whether the claim for benefits allegedly due under the statutory requirements is or is not, at bottom, a claim for injunctive or other equitable relief. No matter how well founded it may be as a matter of substantive law, a claim for benefits is not cognizable under §

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[6]In England, for example, this has been true since 1875. See W.M. Geldart, *Elements of English Law* (5th Ed.1953) at p. 22. In some American jurisdictions--New Jersey, for example--the fusion took place within living memory. See N.J. Const., Art. 11, § 4, § 3 (1947).

[7]Geldart, *id.*

502(a)(3) of ERISA unless it is a claim for "equitable relief."

As used in § 502(a)(3), the Supreme Court has repeatedly held, "equitable relief" refers to "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993); *cf. Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002). And "[a]lmost invariably ... suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Bowen v. Massachusetts*, 487 U.S. 879, 918-19 (1988) (Scalia, J., dissenting), as quoted with approval in *Great-West*, 534 U.S. at 210. "And '[m]oney damages are, of course, the classic form of *legal* relief.' " *Id.* (quoting *Mertens*, 508 U.S. at 255).

Mr. Crosby acknowledged in the court below that suits seeking to compel the defendant to pay a sum of money to the plaintiff are "almost invariably" excluded from the category of suits seeking relief typically available in equity, according to the Supreme Court. Citing *Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000), however, Crosby argued that " '[a]lmost invariably' does not mean 'always'...." (Reply Brief in Support of Plaintiff's Request for Equitable Relief, at page 29.) Because he is seeking imposition of a constructive trust (an equitable remedy) on property that he says "truly and equitably" belongs to him, see *Harris Trust* at 250-51, and because "restitution [another equitable remedy] may be awarded for any 'ill-gotten plan assets or profits,' " see *id.* at 253, Mr. Crosby argued that his individual claim for the wrongfully withheld $5,249.08 was not a claim for legal *595 relief, but a claim for the sort of "equitable relief" spoken of in § 502(a)(3).

We do not find this line of argument persuasive. It is true that Mr. Crosby requested the district court to impose a constructive trust over the amount of plan assets necessary to pay his claim--and over the separate assets of Bowater Incorporated, if necessary--but we do not read *Harris Trust* as suggesting that such a request for securitization of the debt can transmogrify Mr. Crosby's claim for a money judgment into an essentially equitable claim. A glance at the facts of *Harris Trust* explains why.

In *Harris Trust* a retirement plan had purchased certain motel interests from a company that the plan had been using as a stockbroker. Because the stockbroker was a "party in interest," as the Supreme Court assumed, the purchase of the motel interests was prohibited under § 406(a)(1)(A) of ERISA, 29 U.S.C. § 1106(a)(1)(A). Invoking the "equitable relief" provision of ERISA § 502(a)(3), the trustee and the administrator of the retirement plan sued the stockbroker for rescission of the purchase of the motel interests; restitution of the purchase price, with interest, from the stockbroker; and disgorgement of any profits the stockbroker had made with the purchase money.

The Court of Appeals for the Seventh Circuit concluded that as a non-fiduciary, the stockbroker could not be held liable under § 502(a)(3) for participating in a transaction prohibited by § 406. See *Harris Trust and Savings Bank v. Salomon Brothers Inc.*, 184 F.3d 646, 653 (7th Cir.1999). The Supreme Court reversed, holding that the stockbroker's non-fiduciary status did not insulate it from claims for equitable relief under § 502(a)(3).

Referring to the law of trusts--one of the main branches of equity jurisprudence--the *Harris Trust* court observed that

> "it has long been settled that when a trustee in breach of his fiduciary duty to the beneficiaries transfers trust property to a third person, the third person takes the

> property subject to the trust, unless he has purchased the property for value and without notice of the fiduciary's breach of duty. The trustee or beneficiaries may then maintain an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's profits derived therefrom." *Harris Trust*, 530 U.S. at 250.

The Court went on to explain that

> "[o]nly a transferee of ill-gotten trust assets may be held liable, and then only when the transferee (assuming he has purchased for value) knew or should have known of the existence of the trust and the circumstances that rendered the transfer in breach of the trust." *Id.* at 251.

And--making an obvious point that has obvious significance for us--the Supreme Court observed that a suit against a transferee for tainted plan assets, in addition to satisfying the "appropriateness" criterion,

> "is also '*equitable* ' in nature. See *Mertens*, 508 U.S., at 260 ('[T]he "*equitable relief*" awardable under § 502(a)(5) *includes restitution of ill-gotten plan assets or profits ...*'); *ibid.* (explaining that, in light of the similarity of language in §§ 502(a)(3) and (5), that language should be deemed to have the same meaning in both subsections)." *Id.* at 253, 113 S.Ct. 2063 (emphasis supplied).

In the case at bar, of course, Mr. Crosby is not seeking restitution to the plan of assets wrongfully conveyed to a third party. He is not seeking to have a constructive trust imposed

on assets so conveyed.[8] And he is not seeking disgorgement of profits made by a third party on ill-gotten assets. *Harris Trust*, as we see it, is thus inapposite.

While *Harris Trust* is readily distinguishable from the case now before us, *Great-West*, in our judgment, is not. It is true that the plaintiffs in *Great-West* sought to impose personal liability on the defendants for a *contractual* obligation to pay money, whereas here the plaintiff insists that the asserted liability is not contractual in nature.[9] But if we accept, for purposes of analysis, plaintiff Crosby's representation that he,

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[8]Mr. Crosby does ask for imposition of a constructive trust over sufficient assets to assure that his claim will be paid, thereby putting him in a better position than he would occupy as a general creditor. But Crosby has no basis for obtaining such a priority, as far as we can see, and he is clearly not asking for application of the principle applied in *Harris Trust*--the principle that trust property transferred to a third party in breach of the trustee's fiduciary duty is impressed with a trust "unless [the third party] has purchased the property for value and without notice of the fiduciary's breach of duty." *Harris Trust*, 530 U.S. at 250.

[9]On its face, as we have seen, the language of the retirement plan's lump sum provision contemplates payment of an amount equal only to the participant's Personal Account--an amount less than Bowater has already voluntarily paid. In addition to pointing this out, Mr. Crosby notes that among the plan's miscellaneous provisions is the following: "The adoption and maintenance of this Plan shall not be deemed to constitute a contract, expressed or implied, between the Company and any Employee or to be a consideration for, or inducement or condition of, the employment of any person." It thus seems clear that Mr. Crosby would have had no claim for breach of contract absent ERISA, whatever the situation may be in light of ERISA.

unlike the plaintiffs in *Great-West*, has no claim for breach of contract, we think that the distinction between the *Great-West* case and this one is a distinction without a difference.

The statutory origin of Bowater's asserted obligation to pay Mr. Crosby an additional $5,249.08, with interest, does not mean that a breach of the obligation to pay is redressable through a suit in equity rather than an action at law. Historically, an action in debt was no less an action at law than an action in covenant. See F.W. Maitland, The Forms of Action at Common Law 63, 64 (A.H. Chaytor & W.J. Whittaker eds., 1948). And an action of assumpsit (a form of trespass on the case) to redress the breach of a statutory obligation to pay a sum certain was likewise an action at law. See G.C. Cheshire and C.H.S. Fifoot, Law of Contract 15 (3rd ed.1952); *Marley v. Bankers' Indemnity Insurance Co.*, 166 A. 350, 351 (1933) (holding that trespass on the case is the appropriate action to enforce a statutory right).

If it be argued that Mr. Crosby's position should be likened to that of a beneficiary of a trust, who could invoke the jurisdiction of an equity court to enforce a right to receive money from the trust, the short answer is that just such an argument has been explicitly rejected by the United States Supreme Court. See *Great-West*, 353 U.S. at 219:

> "These trust remedies are simply inapposite. In *Mertens*, we rejected the claim that the special equity-court powers applicable to trusts define the reach of § 502(a)(3)."

It remains to be mentioned that Mr. Crosby does request a form of equitable relief in asking that the defendants be ordered to recompute--without any mortality discount for the period before normal retirement age--"any and all lump sum benefits previously paid to Plan participants," including Mr. Crosby. As far as Crosby's individual claim is concerned, however, such a recomputation by the defendants is

unnecessary; Mr. Crosby or his advisors have already performed the recomputation themselves, and Crosby's complaint specifies the amount claimed to be due him down to the last penny. Equity, as the pertinent equitable maxim tells us, does not require the doing of a vain act.

Mr. Crosby's complaint also asks for equitable relief in the form of injunction against use of a pre-normal-retirement-age mortality discount factor in computing *future* lump sum distributions. Assuming that such relief might be beneficial to someone, however, it could only benefit members of the class other than Mr. Crosby. In the next (and concluding) part of this opinion we address the question whether Mr. Crosby can maintain the present suit on behalf of other class members who might arguably receive some benefit from the equitable relief sought for them.

III

The Supreme Court has held that a class action may proceed despite the dismissal of the named plaintiff's claim, if the class has been certified and at least one class member has a live claim. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991), and *Sosna v. Iowa*, 419 U.S. 393, 399-403 (1975). But these decisions in no way detract from the principle that the judicial power of Article III courts extends only to the "cases and controversies" specified in that article. If the class action is to be maintained, therefore, there must be "a named plaintiff who has such a case or controversy at the time the complaint is filed and at the time the class action is certified." *Sosna*, 419 U.S. at 402. Where the named plaintiff's claim is one over which "federal jurisdiction never attached," there can be no class action. See *Walters v. Edgar*, 163 F.3d 430, 432-33 (7th Cir.1998), *cert. denied*, 526 U.S. 1146 (1999).

For reasons already explained, we do not believe that Mr. Crosby ever had a justiciable claim under ERISA § 502(a)(3), the particular statutory provision on which he

elected to sue. Our caselaw teaches--perhaps surprisingly--that federal subject matter jurisdiction is lacking in such a situation. Thus in *Qualchoice, Inc. v. Rowland*, 367 F.3d 638, 650 (6th Cir.2004), we affirmed the dismissal, on jurisdictional grounds, of an action that sought essentially legal relief under § 502(a)(3). In *Community Health Plan of Ohio v. Mosser*, 347 F.3d 619, 624 (6th Cir.2003), similarly, we held that an action seeking legal relief under § 502(a)(3) must be dismissed for lack of subject matter jurisdiction. *Community Insurance Co. v. Morgan*, 54 Fed. Appx. 828, 831-33 (6th Cir.2002), and *Sheet Metal Local # 24 v. Newman*, 35 Fed. Appx. 204, 207 (6th Cir. 2002), are in accordance with that holding. If these decisions mean what they say, federal jurisdiction never attached to Mr. Crosby's claim in the case at bar. It follows that there is no class action. See *Walters*, 163 F.3d at 432-33.

The judgment entered by the district court is **VACATED** and the case is **REMANDED** with instructions to DISMISS Mr. Crosby's complaint for lack of subject matter jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-1044

FILED
SEP - 9 2004
LEONARD GREEN
CLERK

Frank J. CROSBY, individually and on behalf of all others similarly situated,
Plaintiff-Appellee,

v.

BOWATER INCORPORATED RETIREMENT PLAN FOR SALARIED EMPLOYEES OF GREAT NORTHERN PAPER INC. and BOWATER, INCORPORATED,
Defendants-Appellants.

Before: BOGGS, Chief Judge; NELSON and SUTTON, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is VACATED and the case is REMANDED with instructions to DISMISS plaintiff Frank J. Crosby's complaint for lack of subject matter jurisdiction.

ENTERED BY ORDER OF THE COURT
/s/Leonard Green
Leonard Green, Clerk

No. 03-1044
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT **FILED**

FRANK J. CROSBY, INDIVIDUALLY AND IN BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiff-Appellee,	)	NOV 10 2004 LEONARD GREEN Clerk
v. BOWATER INCORPORATED RETIREMENT PLAN FOR SALARIED EMPLOYEES OF GREAT NORTHERN PAPER INC., ET AL., Defendants-Appellants.	)	ORDER

BEFORE: BOGGS, Chief Judge; NELSON and SUTTON, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

ERISA STATUTES

29 U.S.C. §1001

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that **the continued well-being and security of millions of employees and their dependents are directly affected by these plans**; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that **owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries**, and to provide for the general welfare and the free flow of commerce, **that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans**; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that **despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of**

plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that **it is therefore desirable in the interests of employees and their beneficiaries**, for the protection of the revenue of the United States, and to provide for the free flow of commerce, **that minimum standards be provided assuring the equitable character of such plans and their financial soundness**.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and **the interests of participants in employee benefit plans and their beneficiaries**, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, **and by providing for appropriate remedies**, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and **the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans** by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

(emphasis added)

. . . . . .

29 U.S.C. §1053(a)

Minimum vesting standards

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A) or (B).

(A) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service:	The nonforfeitable percentage is
3	20
4	40
5	60
6	80
7 or more	100.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable **solely** because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as

provided in section 1055 of this title).

* * *

(underlined emphasis added)

. . . . . .

29 U.S.C. §1103(a), (c)

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that--

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

* * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of Title 26 (as in effect on October 22, 2004), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of

providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(emphasis added)

. . . . . .

29 U.S.C. §1104(a)

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter [i.e., subchapter I of ERISA] and subchapter III of this chapter.

(underlined emphasis and bracketed text added)

29 U.S.C. §1109

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter [i.e., subchapter I] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

. . . . . .

29 U.S.C. §1132(a)

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought–

(1) by a participant or beneficiary–
(A) for the relief provided for in subsection (c) of this section, or
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) of this section or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [FN1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

INTERNAL REVENUE CODE STATUTES

26 U.S.C. §402(a),(c)

(a) Taxability of beneficiary of exempt trust.--Except as otherwise provided in this section, any amount actually distributed to any distributee by any employees' trust described in section 401(a) which is exempt from tax under section 501(a) shall be taxable to the distributee, in the taxable year of the distributee in which distributed, under section 72 (relating to annuities).

* * *

(c) Rules applicable to rollovers from exempt trusts.--

(1) Exclusion from income.--If--

(A) any portion of the balance to the credit of an employee in a qualified trust is paid to the employee in an eligible rollover distribution,

(B) the distributee transfers any portion of the property received in such distribution to an eligible retirement plan, and

(C) in the case of a distribution of property other than money, the amount so transferred consists of the property distributed,

then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

* * *

26 U.S.C. §417(e)(3)

(3) Determination of present value.--

(A) In general.--

(i) Present value.--Except as provided in subparagraph (B), for purposes of paragraphs (1) and (2), the present value shall not be less than the present value calculated by using the applicable mortality table and the applicable interest rate.

(ii) Definitions.--For purposes of clause (i)--

(I) Applicable mortality table.--The term "applicable mortality table" means the table prescribed by the Secretary. Such table shall be based on the prevailing commissioners' standard table (described in section 807(d)(5)(A)) used to determine reserves for group annuity contracts issued on the date as of which present value is being determined (without regard to any other subparagraph of section 807(d)(5)).

(II) Applicable interest rate.--The term "applicable interest rate" means the annual rate of interest on 30-year Treasury securities for the month before the date of distribution or such other time as the Secretary may by regulations prescribe.

OTHER STATUTES

15 U.S.C. §16

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . .

. . . . . .

42 U.S.C. §2000e-5(g)(1)
(1972-present)

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated

against shall operate to reduce the back pay otherwise allowable.

. . . . . .

50 U.S.C. App. §925(a) (terminated)
[§205 of Emergency Price Control Act of 1942]

Whenever in the judgment of the Administrator any person has engaged or is bout to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provisions and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

. . . . . .

TREASURY REGULATIONS

26 C.F.R. §1.411(d)-4, Q&A2(a)(4)

(4) Benefits payable to a spouse or beneficiary. [Code] Section 411(d)(6) protected benefits [includes accrued benefits] may not be eliminated merely because they are payable with respect to a spouse or other beneficiary.

(bracketed text added)

LEGISLATIVE HISTORY

S. Rep. No. 93-127
1974 U.S.C.C.A.N. 4838, 4870, 4889, 4988-4989
(Apr. 18, 1973)
(cited parts only)

The enforcement provisions [of ERISA] have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.

* * *

Under the bill, the Secretary of Labor and participants and beneficiaries of a plan may bring civil actions for any appropriate legal or equitable relief to redress or restrain a violation of fiduciary duties. . . . Appropriate equitable relief may be granted in a civil action. For example, injunctions may be granted to prevent a violation of fiduciary duty, and a constructive trust may be imposed on the plan assets, if needed to protect the participants and beneficiaries.

(emphasis added)

. . . . . .

H.R. Rep. No. 93-533
1974 U.S.C.C.A.N. 4639, 4643, 4655 (Oct. 2, 1973)
(cited parts only)

In the absence of adequate federal standards, the participant is left to rely on the traditional equitable remedies of the common law of trusts. . . . The fact that statutory rules exist says little as to their efficacy in adjusting inequities that are visited upon plan participants, as evidenced by the hearings before this Committee. . . . Courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording.

* * *

The enforcement provisions [of ERISA] have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.

* * *

(emphasis added)

. . . . . .

H.R. Conf. Rep. 93-1280
1974 U.S.C.C.A.N. 5038, 5076 (Aug. 12, 1974)
(cited parts only)

The labor law provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries. . . .

120 Cong. Rec. 29,198, 29,200 (Aug. 20 1974)
(cited parts only)

MR. ULLMAN: . . . I urge the adoption of the legislation that is now before us, the Employee Retirement Income Security Act of 1974. . . .

* * *

The labor law provisions provide rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries. . . .

* * *

. . . . . .

120 Cong. Rec. 29,928-929, 29,932 (Aug. 20, 1974)
(cited parts only)

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974–CONFERENCE REPORT

* * *

MR WILLIAMS: Mr. President, returning to a brief discussion of the provisions of the conference report . . .

* * *

Providing administrative and judicial remedies, available to both the government and participants, which will assure compliance with the foregoing substantive provisions. . . .

* * *

Despite the value of full reporting and disclosure, it has become clear that such provisions are not in themselves sufficient to safeguard employee benefit plan assets from such abuses as self-dealing, imprudent investing, and misappropriating of plan funds. Neither existing State nor Federal law has been effective in preventing or correcting many of these abuses. Accordingly, the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to make applicable the law of trusts; to prohibit exculpatory clauses that have often been used in this field; to establish uniform fiduciary standards to prevent

transactions which dissipate or endanger plan assets; and to provide effective remedies for breach of trust.

* * *

(underlined emphasis added)

. . . . . .

LEARNED WORKS

G. Bogert, Trusts & Trustees (2d ed. 1982)
(cited parts only)

§862. Decree Against the Trustee for the Payment of Money-Damages

For a breach of trust the trustee may be directed by the court to pay damages to the beneficiary out of the trustee's own funds, either in a suit for that purpose or on an accounting where the trustee is surcharged beyond the amount of his admitted liability.

* * *

. . . If the trust property, or its substitute, can be traced into the property in the hands of the trustee or his representative, the beneficiary is not dependent upon the recovery of a money judgment against the trustee and its collection from the trustee's general assets; the beneficiary may elect the remedy of following the trust property . . .

* * *

Another rule of damages provides that a trustee is liable for any profit he has made through his breach of trust even though the trust has suffered no loss. . . .

A third measure of damages permits recovery of profit that would have accrued to the trust had there been no breach of trust.

* * *

In other cases, where the essence of the suit is the conversion of trust property, the beneficiary may be given the option of holding the trustee liable in damages for the value of the trust property at one time or another, or for the value of one item of property or another, or, where the trustee has used

the trust fund for his own benefit, reconveying the property and holding the trustee liable for the actual income obtained from the trust property or for interest.

* * *

. . . . . .

D. Dobbs, Law of Remedies (2d ed. 1983)
(cited parts only)

§4.1 Restitution and Unjust Enrichment

* * *

Unjust enrichment basis of restitution claims. . . . In spite of their diversity, restitution claims are bound by a major unifying thread. Their purpose is to prevent the defendant's unjust enrichment by recapturing the gains the defendant secure in a transaction.

* * *

Relation to Restitution Damages

Remedial differences. Restitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain. It differs in its goal or principle from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss. . . .

* * *

Relation of Restitution to Equity

The substantive basis of restitution is related to substantive equity. That is, courts applying substantive equity and courts applying the law of unjust enrichment are both applying a law of "good conscience." Remedially and historically speaking, however, restitution might be either a purely legal claim or a purely equitable claim.

* * *

Unjust enrichment as the basis of liability. The fundamental substantive basis for restitution is that the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff. Restitution rectifies unjust enrichment by forcing restoration

to the plaintiff.

* * *

Equity

Restitution claims are initiated in the same way that other claims are initiated . . . The most notable equitable procedures to enforce restitution are the constructive trust, the equitable lien, and subrogation. These procedures give the plaintiff restitution by giving the plaintiff title to, or a security interest in particular property; or, in the case of subrogation, by giving the plaintiff the rights formerly held by another person.

* * *

§4.3 Restitution in Equity–Terminology and Procedure

Equity's advantage in fashioning restitutionary remedies was exactly at this point: equity had developed a method of sidestepping title problems. Equity's theory was that it did not decide title but acted *in personam*. It did not act on title or property but upon the person of the defendant, compelling him to follow good conscience rather than good title. If the defendant had secured legal title to Blackacre by unconscionable acts, the equity courts could simply order the defendant to reconvey Blackacre to the plaintiff. Equity's moral interest in conscience was coupled with an enormous power the law courts did not have, to act against the person rather than against the property. Equity courts would express the defendant's liability to reconvey by calling him a constructive trustee.

* * *

Major Restitutionary Remedies in Equity

Acting mainly on these foundations of the *in personam* power coupled with a flexible standard of "good conscience," the chancellors developed several similar restitutionary remedies of great consequence. These were: (1) the constructive trust; (2) the equitable lien; (3) subrogation; (4) the accounting for profits. These are sister remedies. They have

several elements in common and all of them bore strong resemblance to, or can even be considered as forms of the constructive trust.

* * *

§4.3(2) The Constructive Trust
In Summary

When equity imposes a constructive trust upon an asset of the defendant, the plaintiff ultimately gets formal legal title. The effect is to allow the plaintiff to recover the asset in specie. For instance, the plaintiff may recover legal rights in Blackacre itself, or a particular bank account, or rights in an intangible such as a trademark, not merely a money judgment equal to the value of such assets. . . . The constructive trust might be imposed upon any identifiable kind of property or entitlement in the defendant's hands if, in equity and conscience, it belongs to the plaintiff. . . .

* * *

The Mechanism of the Constructive Trust

The constructive trust and quasi-contract. Equity courts developed an equitable parallel to the law courts' quasi-contract. Equity called this a constructive trust. . . .

* * *

The constructive trust . . . restores to the plaintiff a particular asset, which is either the asset that rightly belongs to the plaintiff or one substituted for it. . . . The constructive trust allows the plaintiff to recover an asset even if he has no legal title to it, so long as that asset is regarded as "belonging" to him in an equitable sense.

* * *

Requirement of res or property. The constructive trust is only used when the defendant has a legally recognized right in a particular asset. The asset may be an intangible entitlement such as a trademark. It may even be a fund of money like a bank account. But whatever it is, it must be an asset that can be identified as belonging in good conscience to the plaintiff in spite of the defendant's legal right to it. . . .

* * *

Operation and Effects of the Constructive Trust

* * *

Adequate remedy at law. Certain claims in equity were traditionally dismissed if the chancellor thought the plaintiff would have an adequate remedy at law. Claims subject to the adequacy rule were claims based on rights the law courts recognized or created in the first place. The plaintiff in such cases resorted to equity only in hopes of a more effective remedy for a legal right. The constructive trust claim is different. It is not a claim based on a legal right. On the contrary, constructive trusts are needed because legal title is in the defendant. The plaintiff seeking a constructive trust does not assert a legal right but an equitable interest. In this setting, the adequacy of legal remedy seems irrelevant. Professor Palmer concludes that the adequacy rule has no effect when the claim is against a fiduciary, so that the case may proceed in equity even if there is an adequate remedy at law; but when the defendant is not a fiduciary, he believes the results are unpredictable. . . .

* * *

Constructive Trust in Relation to Other Trusts

The constructive trust is not in fact a trust, but a remedy which is explained by analogy to trusts.

* * *

(underlined emphasis added).

G. Palmer, Law of Restitution (1978)
(cited parts only)

§1.3 The History of Constructive Trust

* * *

[T]he typical constructive trust decree is one for specific restitution, but in *Newton v. Porter* [69 N.Y. 133 (1877)] the court entered a simply money judgement against the lawyers when tracing failed. It was a money judgment that could not have been obtained at law, however, for tracing is a technique developed in equity that remains almost entirely in the province of equity. The constructive trust idea was used as the means of treating the plaintiffs as having an equitable right to the securities, as against both the thieves and their lawyers, so as to enable the plaintiffs to recover the value of the securities when the could not longer be traced. . . . The decision helps to explain Judge Cardozo's frequently quoted statement that a "constructive trust is the formula through which the conscience of equity finds expression." [Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 122 N.E. 378 (1919)].

* * *

1.6 The Effect of the Adequacy Doctrine on the Availability of Restitution

Restitution is frequently sought where the plaintiff has another remedy . . . The availability of restitution is not dependent upon inadequacy of the alternative remedy. This is a historic limitation on the assertion of equity jurisdiction which must be taken into account when restitution is sought in equity, but there is no independent principle that confines restitution to cases in which alternative remedies are inadequate.

Although an occasional decision suggests that restitution will be denied when alternative remedies are considered adequate, innumerable cases demonstrate that this is incorrect.

* * *

There is little reason to doubt that equitable relief will be given if that is the only means of reaching the particular defendant . . . This is the substance of *Newton v. Porter* [69 N.Y. 133 (1877)], where the plaintiff could have sued the thieves in quasi contract to recover the value of stolen bonds or the amount realized on their sale, but the only means by which he could reach the defendant lawyers who acquired property from the thieves was in equity since it was necessary to trace in a manner that would not be allowed at law. Doubtless it was true that the plaintiff's remedy against the thieves was inadequate, but a showing of such inadequacy would be quite unnecessary to give standing to the suit in equity against the defendants.

* * *

§3.7 Equitable Relief as Dependent on the Inadequacy of Remedies at Law

* * *

The availability of some restitutionary remedy is never dependent upon a finding that the damage remedy is inadequate. That is, restitution stands upon an equal footing with the damage remedy and will always be granted without inquiry into the adequacy of the damage remedy.

* * *

(citations in brackets added)

. . . . . .

J. Pomeroy, Equity Jurisprudence (4th ed. 1918)
(cited parts only)

§158. . . .The actual remedies which a court of equity gives depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always by its decree declare the rights, interests, or estate of the *cestui que trust*, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the *final* relief to be obtained by the *cestui que trust* consists in

the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust, and a distribution of the trust moneys among all the beneficiaries who are entitled to share therein.

* * *

§181. **Effect of a Partial Jurisdiction.**– . . . [W]hen a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters at issue. For this reason, if the controversy contains any equitable feature or requires any purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.

* * *

. . . . . .

A. Scott, Law of Trusts (3d ed. 1967)

§199. Equitable remedies of beneficiary. A court of equity, having jurisdiction over the administration of trusts, will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests. . . .

* * *

§199.3. Redress for breach of trust. If the trustee has committed a breach of trust the beneficiaries can maintain a suit in equity to compel him to redress the breach of trust, either by making specific reparation or by the payment of money or otherwise.

* * *

§205. Liability in case of breach of trust. Where the trustee commits a breach of trust, the beneficiaries have three possible alternative remedies. They can charge the trustee with any loss which resulted from the breach of trust, or with any profit made through the breach of trust, or with any profit which would have accrued if there had been no breach of trust.

In the first place, if a breach of trust results in a loss to the trust estate, the trustee is chargeable with the amount of the loss. Thus the trustee is subject to a surcharge . . . On the other hand, he is not subject to a surcharge for a breach of trust which results in no loss.

Secondly, if the trustee commits a breach of trust which results in a gain, he is accountable for the gain. The trustee will not be allowed to profit through the breach of trust . . .

Thirdly, if a breach of trust results in the failure to make a gain which would otherwise have accrued to the trust estate, the trustee is chargeable with the amount of the gain which would have accrued. The beneficiaries are entitled to be put in the position which they would have occupied if no breach of trust had been committed. . . .

* * *

(underlined emphasis added)

. . . . . .

Restatement of Restitution (1937)

§160 CONSTRUCTIVE TRUST

Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.

Comment:

a. Constructive trust and express trust. . . . A constructive trust does not, like an express trust, arise because of a manifestation of an intention to create it, but it is imposed as a remedy to prevent unjust enrichment. . . .

* * *

b. Constructive trust and resulting trust. . . . a Constructive trust is imposed not because of the intention of the parties but because the person holding the title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property. . . .

* * *

c. Unjust enrichment. A constructive trust is imposed upon a person in order to prevent his unjust enrichment. To present such unjust enrichment an equitable duty to convey the property to another is imposed upon him. . . .

* * *

d. Unjust enrichment and unjust deprivation. In most cases where a constructive trust is imposed the result is to restore to the plaintiff property of which he has been unjustly deprived and to take from the defendant property the retention of which by him would result in a corresponding unjust enrichment of the defendant; in other words the effect is to prevent a loss to the plaintiff and a corresponding gain to the defendant, and to put each of them in the position in which he was before the defendant acquired the property.

There are some situations, however, in which a constructive trust is imposed in favor of a plaintiff who has not suffered a loss or who has not suffered a loss as great as the benefit received by the defendant. In these situations the defendant is compelled to surrender the benefit on the ground that he would be unjustly enriched if he were permitted to retain it, even though that enrichment is not at the expense or wholly at the expense of the plaintiff. Thus, if the defendant has made a profit through the violation of a duty to the plaintiff to whom he is in a fiduciary relation, he can be compelled to surrender the profit to the plaintiff, although the profit was not made at the expense of the plaintiff (see §107). . . . So also, in certain cases where the defendant wrongfully prevents the plaintiff from acquiring property and acquires the property for himself, the defendant can be compelled to surrender the property to the plaintiff, and not merely to restore the property to the person from whom the defendant wrongfully acquired it (see §169).

* * *

i. Necessity of trust property. A constructive trust does not arise unless there is property on which the constructive trust can be fastened, and such property is held by the person to be charged as constructive trustee . . .

* * *

. . . . . .

Restatement (Second) of Trusts (1959)
(cited parts only)

§74. The Necessity Of Trust Property

A trust cannot be created unless there is trust property.

Comment:

a. the trust as a method of disposing of property. . . . [A] trust is a relationship with respect to property, and the person by whom the title to the property is held, the trustee, is subject to equitable duties to deal with the property for the benefit of another person, the beneficiary. . . .

* * *

[T]he duties result from the trust relation, and are not based upon an agreement or contract, and are enforceable event though the trustee received no consideration. . . .

* * *

The relation between trustee and beneficiary is a fiduciary relation . . . The remedies of the beneficiary of a trust against a trustee are ordinarily exclusively equitable . . .

* * *

§197. Nature Of Remedies Of Beneficiary

Except as stated in §198, the remedies of the beneficiary against the trustee are exclusively equitable.

Comment:

a. Equitable remedy. An equitable remedy is a remedy given by a court of chancery or a court having and exercising the powers of a court of chancery. . . .

b. Breach of contract. A trustee who fails to perform his duties as trustee is not liable to the beneficiary for breach of contract . . . the creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract. Moreover, questions of the administration of trusts have always been regarded as of a kind which can adequately be dealt with in a suit in equity rather than in an action at law . . .

§198. Legal Remedies Of Beneficiary [limited to collection actions]

(1) If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment.

(2) If the trustee of a chattel is under a duty to transfer it immediately and unconditionally to the beneficiary and in breach of trust fails to transfer it, the beneficiary can maintain an action at law against him.

* * *

§205. Liability In Case Of Breach Of Trust

If the trustee commits a breach of trust, he is chargeable with

(a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or
(b) any profit made by him through the breach of trust; or
(c) any profit which would have accrued to the trust estate if there had been no breach of trust.

Comment:

a. Alternative remedies for breach of trust. If the trustee commits a breach of trust, the beneficiary may have the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust; or of pursuing a remedy which will give him any profit which the trustee has made by committing the breach of trust; or of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust. . . .

* * *

[bracketed text added]

. . . . . .

MISCELLANEOUS

IRS Notice 96-8

Internal Revenue Service (I.R.S.)

Notice

CASH BALANCE PENSION PLANS

Released: January 18, 1996

Published: February 5, 1996

Determining amount of single sum distributions from cash balance plans. This notice provides guidance concerning the requirements of section 411(a) and 417(e) with respect to the determination of the amount of a single sum distribution from a cash balance plan. The notice also describes proposed guidance to be issued later in regulations that would provide a list of standard indices and associated margins for use by cash balance plans in determining the amount of interest credits.

I. Purpose

This notice describes and requests comments on proposed guidance concerning the application of sections 411 and 417(e) to single sum distributions under defined benefit pension plans that are cash balance plans. The proposed guidance is being described in this notice in order to permit advance public comment in anticipation of the publication of regulations that incorporate the proposed guidance.

II. Background

A. General description of cash balance plans

In general terms, a cash balance plan is a defined benefit pension plan that defines benefits for each employee by reference to the amount of the employee's hypothetical account balance. An employee's hypothetical account balance is credited with hypothetical allocations and hypothetical earnings determined under a formula selected by the employer and set forth in the plan. These hypothetical allocations and hypothetical earnings are designed to mimic the allocations of actual contributions and actual earnings to an employee's account that would occur under a defined contribution plan. Cash balance plans often specify that hypothetical earnings (referred to in this notice as interest credits) are determined using an interest rate or rate of return under a variable outside index (e.g., the annual yield on one-year Treasury securities). Most cash balance plans also are designed to permit, after termination of employment, a distribution of an employee's entire accrued benefit in the form of a single sum distribution equal to the employee's hypothetical account balance as of the date of the distribution. Many cash balance plans also provide that if distribution is in the form of an annuity, the amount of the annuity is determined by dividing the hypothetical account balance by an annuity conversion factor.

As explained below, in order to comply with sections 411(a) and 417(e) in calculating the amount of a single sum distribution under a cash balance plan, the balance of the employee's hypothetical account must be projected to normal retirement age and then the employee must be paid at least the present value, determined in accordance with section 417(e), of that projected hypothetical account balance. If a cash balance plan provides interest credits using an interest rate that is higher than the section 417(e) applicable interest rate, payment of a single sum distribution equal to the hypothetical account balance as a complete distribution of the employee's accrued benefit may result either in a violation of section 417(e) or a forfeiture in violation of section 411(a). This is because, in such a case, the present value of the employee's accrued benefit, determined using the section 417(e) applicable interest rate, will generally exceed the hypothetical account balance. The following example illustrates this potential problem.

Example. A cash balance plan provides for interest credits at a fixed rate of 8% per annum that are not conditioned on continued employment, and for annuity conversions using the section 417(e) applicable interest rate and mortality table. A fully vested employee with a hypothetical account balance of $45,000 terminates employment at age 45 and elects an immediate single sum distribution. At the time of the employee's termination, the section 417(e) applicable interest rate is 6.5%.

The projected balance of the employee's hypothetical account as of normal retirement age is $209,743. If $209,743 is discounted to age 45 at 6.5% (the section 417(e) applicable interest rate), the present value equals $59,524.

Accordingly, if the plan paid the hypothetical account balance of $45,000, instead of $59,524, the employee would receive $14,524 less than the amount to which the employee is entitled.

Even if a cash balance plan provides interest credits using an interest rate that exceeds the section 417(e) applicable interest

rate, the plan can satisfy sections 417(e) and 411(a). Such a plan would provide that the amount of any single sum distribution is equal to the present value of the employee's accrued benefit determined in a manner that satisfies sections 411(a) and 417(e) even if the amount of the single sum exceeds the employee's hypothetical account balance. Thus, in the example above, the plan would satisfy sections 411(a) and 417(e) if the employee received a single sum distribution of $59,524 (the present value of the employee's accrued benefit) rather than $45,000 (the employee's hypothetical account balance).

B. Existing regulatory safe harbor for cash balance plans

Section 1.401(a)(4)-8(c) of the Income Tax Regulations, as issued in September 1991, provides a safe harbor testing method for cash balance plans. Under this method, a cash balance plan could be tested for nondiscrimination as though it were a defined contribution plan with actual allocations equal to the amount of the hypothetical allocations credited for the plan year. In order to use the safe harbor, a cash balance plan must satisfy certain design requirements that relate to the accrued benefit and valuation rules that are unique to defined benefit plans.

Comments on the September 1991 regulations expressed concern that the safe harbor plan design requirements reflected an interpretation by the Service and Treasury of the qualification requirements that, in certain cases, would require cash balance plans to pay a single sum distribution in excess of the hypothetical account balance. Guidance was requested on the circumstances in which a cash balance plan (whether or not it qualifies for safe harbor nondiscrimination testing) is permitted to distribute a single sum distribution equal to the hypothetical account balance without violating section 411(a) or 417(e).

When revised regulations under section 401(a)(4) were issued in September 1993, the safe harbor testing method for cash balance plans was left unchanged. The Preamble to those

regulations indicated that the safe harbor testing method for cash balance plans had generated significant comment and that further guidance would be issued at a later date.

III. Analysis

A. Nonforfeiture and accrual rules

A cash balance plan is a defined benefit plan, not a defined contribution plan, because the benefits provided are not based solely on actual contributions and forfeitures allocated to an employee's account and the actual investment experience and expenses of the plan allocated to the account. Section 411(a)(7) defines an employee's accrued benefit differently for defined benefit plans than for defined contribution plans. Also, defined benefit plans are subject to a number of statutory provisions that do not apply to defined contribution plans. These include the rules of section 411(b)(1) that limit "backloading" of accruals; the valuation rules of section 417(e); and the definitely determinable benefits requirement of section 401(a)(25). These provisions limit the extent to which a cash balance plan can mimic the benefit and accrual structure of a defined contribution plan.

Under section 411(a)(2), an employee's accrued benefit must become nonforfeitable in accordance with one of the schedules specified in that section. Under s 1.411(a)-7(a)(1)(ii), the term "accrued benefits" generally refers only to pension or retirement benefits. Under section 411(b)(1), the accrual of the retirement benefits payable at normal retirement age must satisfy one of the rules in section 411(b)(1)(A), (B) or (C).

Under a cash balance plan, the retirement benefits payable at normal retirement age are determined by reference to the hypothetical account balance as of normal retirement age, including benefits attributable to interest credits to that age. Thus, benefits attributable to interest credits must be taken into account in determining whether the accrual of the retirement benefits under a cash balance plan satisfies one of the rules in section 411(b)(1)(A), (B) or (C). Moreover, benefits

attributable to interest credits are in the nature of accrued benefits within the meaning of s 1.411(a)-7(a), rather than ancillary benefits, and thus, once accrued, must become nonforfeitable in accordance with a vesting schedule that satisfies section 411(a).

Cash balance plans can be categorized based on when the benefits attributable to interest credits accrue. Under one type of cash balance plan (referred to in this notice as a frontloaded interest credit plan), future interest credits to an employee's hypothetical account balance are not conditioned upon future service. (Of course, benefits attributable to future interest credits may be forfeited in accordance with the plan's vesting provisions, to the extent permitted under section 411.) Thus, in the case of a frontloaded interest credit plan, the benefits attributable to future interest credits with respect to a hypothetical allocation accrue at the same time that the benefits attributable to the hypothetical allocation accrue. As a result, if an employee terminates employment and defers distribution to a later date, interest credits will continue to be credited to that employee's hypothetical account.

A second type of cash balance plan (referred to in this notice as a backloaded interest credit plan) conditions future interest credits upon further service. In the case of a backloaded interest credit plan, benefits attributable to interest credits do not accrue until the interest credits are credited to the employee's account. Because backloaded interest credit plans typically will not satisfy any of the accrual rules in section 411(b)(1)(A), (B) or (C), it is anticipated that the proposed guidance will address only frontloaded interest credit plans.

B. Single sum distributions from frontloaded interest credit plans

As indicated above, most cash balance plans are designed to permit a distribution of an employee's entire accrued benefit, after termination of employment, in the form of a single sum equal to the employee's hypothetical account balance as of the date of the distribution. In order for a defined benefit plan to

satisfy section 417(e), any single sum distribution payable to an employee from the plan must not be less than the nonforfeitable portion of the present value of the employee's accrued benefit under section 411(a)(7) (determined using the applicable interest rate and mortality table under section 417(e)).

1. Determination of the accrued benefit

In the case of a frontloaded interest credit plan, an employee's accrued benefit as of any date before attainment of normal retirement age is based on the employee's hypothetical account balance as of normal retirement age, including future interest credits to that age. If such a plan specifies a fixed interest rate for use in determining future interest credits, the employee's hypothetical account balance as of normal retirement age (including future interest credits) can be calculated precisely before normal retirement age. However, if a frontloaded interest credit plan specifies a variable outside index for use in determining the amount of interest credits, the precise dollar amount of an employee's hypothetical account balance as of normal retirement age (including future interest credits to normal retirement age), and thus the precise dollar amount of the employee's accrued benefit as of any date before normal retirement age, cannot be calculated prior to normal retirement age.

A frontloaded interest credit plan that specifies a variable outside index for use in determining the amount of interest credits must prescribe the method for reflecting future interest credits in the calculation of an employee's accrued benefit. In order to comply with section 401(a)(25), the method, including actuarial assumptions, if applicable, must preclude employer discretion. Further, in determining the amount of an employee's accrued benefit, a forfeiture, within the meaning of s 1.411(a)-4T, will result if the value of future interest credits is projected using a rate that understates the value of those credits or if the plan by its terms reduces the interest rate or rate of return used for projecting future interest credits. A

forfeiture in violation of section 411(a) also will occur if, in determining the amount of an employee's accrued benefit, future interest credits are not taken into account (i.e., there is no projection of future interest credits) and this has the same effect as using a rate that understates the value of future interest credits.

2. Calculation of the present value of the employee's accrued benefit

In the case of a frontloaded interest credit plan, a single sum distribution optional form of benefit equal to the hypothetical account balance will satisfy section 417(e) only if the single sum distribution is not less than the present value of the employee's accrued benefit calculated in accordance with the applicable interest rate and mortality table under section 417(e)(3). As noted above, the amount of the employee's accrued benefit must be determined using a method of reflecting future interest credits that satisfies section 401(a)(25) and that does not create a forfeiture in violation of section 411(a).

3. Situations in which the present value will not exceed the hypothetical account balance

A frontloaded interest credit plan might provide that the amount of interest credits is determined using a variable interest rate or rate of return that, by its terms, is no greater than the applicable interest rate under section 417(e)(3). For example, a plan that has been amended to comply with the changes to section 417(e) made by the Retirement Protection Act of 1994 (RPA '94) might provide that interest credits are determined using the lesser of the current rate of interest on 30-year Treasury securities or the current yield on 1-year Treasury Constant Maturities. Under such a plan, future interest credits can, without violating section 411(a), be projected to normal retirement age using a rate that is no greater than the applicable interest rate under section

417(e)(3). In that case, assuming that the annuity conversion factor under the plan is not less than the annuity conversion factor determined using the applicable interest rate and mortality table under section 417(e)(3), the employee's hypothetical account balance will equal or exceed the present value of the employee's accrued benefit determined in accordance with section 417(e). Thus, a single sum distribution equal to the employee's hypothetical account balance under such a plan will satisfy sections 411(a) and 417(e).

In other cases, a single sum distribution equal to an employee's hypothetical account balance will satisfy sections 417(e) and 411(a) if (a) the annuity conversion factor is not less than the annuity conversion factor determined using the applicable interest rate and mortality table under section 417(e)(3), (b) under the method for reflecting future interest credits in the calculation of an employee's accrued benefit, the future interest credits are projected using a rate that is no greater that the applicable interest rate under section 417(e)(3), and (c) this projection does not result in a forfeiture in violation of section 411(a).

By contrast, if the interest rate or rate of return under the plan used in determining the amount of interest credits is high relative to the section 417(e)(3) interest rate, the plan cannot distribute a single sum equal to the employee's hypothetical account balance and satisfy sections 411(a) and 417(e). If such a plan provided that, in determining an employee's accrued benefit, the rate used for projecting the amount of future interest credits was no greater than the interest rate under section 417(e)(3), the projection would result in a forfeiture. Alternatively, if the plan provided for interest credits to be projected using a rate that exceeded the section 417(e) interest rate but then provided for the benefit to be discounted using that same higher rate, the plan would violate section 417(e).

C. Effect of defining the accrued benefit as the hypothetical account balance

The requirements referred to in this notice apply even in the case of a cash balance plan that defines an employee's accrued benefit as an amount equal to the employee's hypothetical account balance. Section 411(a)(7) defines the accrued benefit in terms of benefits payable under the plan at normal retirement age. In a cash balance plan, for an employee who has not attained normal retirement age, whether the employee's retirement benefit payable at normal retirement age under the plan includes benefits attributable to future interest credits depends on whether those benefits have accrued.

If benefits attributable to future interest credits have accrued, and those benefits are disregarded when benefits commence before normal retirement age, the plan has effectively conditioned entitlement to the benefits attributable to those future interest credits on the employee not taking a distribution prior to normal retirement age. Pursuant to s 1.411(a)-4T, a right that is conditioned under the plan on a subsequent forbearance is a forfeitable right. Accordingly, conditioning entitlement to benefits on the employee not taking a distribution violates the nonforfeitability requirements of section 411(a).

Alternatively, if the benefits attributable to future interest credits have not accrued and will accrue only as of the later dates when the interest credits are included in the hypothetical account balance, the timing of those later accruals must be taken into account in applying the accrual rules of section 411(b)(1). As a result, such a plan typically will not satisfy those accrual rules.

IV. Description of proposal

A. Variable interest rates that may be assumed for these purposes to be no greater than the 30-year Treasury interest rate

It is anticipated that the regulations will set forth a list of standard indices and associated margins for use with frontloaded interest credit plans that provide interest credits equal to the product of the balance of the hypothetical account and the current value of a variable index. (It is anticipated that this proposal will apply without regard to how frequently the rate used to determine interest credits is compounded.) Under a frontloaded interest credit plan that, for this purpose, specifies a variable index equal to the PBGC immediate rate or the sum of one of the standard indices and a margin not greater than the specified margin associated with that standard index, no impermissible forfeiture would result from projecting that the rate used to determine future interest credits for an employee is no greater than the applicable interest rate under section 417(e)(3), as amended by RPA '94. Thus, if such a plan has been amended to comply with the changes to section 417(e) made by RPA '94, the employee's entire accrued benefit could be distributed in the form of a single sum distribution equal to the employee's hypothetical account balance without violating section 411(a) or 417(e), provided that the plan provides the appropriate annuity conversion factors.

The table below provides the proposed list of standard indices and associated margins. The discount rates on Treasury bills and the yields on Treasury Constant Maturities are the rates reported in the Federal Reserve Bulletin, and the Consumer Price Index is CPI-U, as reported by the Department of Labor. Authority would be delegated to the Commissioner to approve other indices and associated margins.

Standard Index	Associated Margin
The discount rate on 3-month Treasury Bills	175 basis points
The discount rate on 6-month Treasury Bills or 12-month Treasury Bills	150 basis points
The yield on 1-year Treasury Constant Maturities	100 basis points
The yield on 2-year Treasury Constant Maturities or 3-year Treasury Constant Maturities	50 basis points
The yield on 5-year Treasury Constant Maturities or 7-year Treasury Constant Maturities	25 basis points

The yield on 10-year Treasury Constant Maturities or any longer period Treasury Constant Maturities	0 basis points
Annual rate of change of the Consumer Price Index	3 percentage points

In developing these standard indices and associated margins, the Service and Treasury took into account the historical relationship between each of these indices and the rate of interest on 30-year Treasury securities.

Under the proposal, if a frontloaded interest credit plan specified a variable index for use in determining the amount of interest credits that is equal to the sum of a standard index (listed in the table above) and a margin that exceeds the specified margin associated with that standard index, distribution of a single sum equal to the employee's hypothetical account balance would not satisfy both section 411(a) and section 417(e). If such a plan provided that the rate used for projecting the amount of future interest credits was no greater than the interest rate under section 417(e)(3), the projection would result in a forfeiture. Alternatively, if a frontloaded interest credit plan provided for interest credits to be projected using a rate that exceeded the section 417(e) interest rate but then provided for the benefit to be discounted using that same higher rate, the plan would violate section 417(e).

B. Guidance will be prospective

The anticipated regulations will be effective prospectively. In addition, for plan years beginning before the regulations are effective, a frontloaded interest credit plan would not be disqualified for failing to satisfy section 411(a) or 417(e) if the amount of the distribution satisfied those sections based on a reasonable, good-faith interpretation of the applicable provisions of the Code, taking into account pre-existing

guidance. For this purpose, plans that comply with the guidance in this notice are deemed to be applying a reasonable, good faith interpretation.

V. Comments

The Service and Treasury invite comments on the **proposal** described in this notice. Comments are specifically requested on other indices for which guidance may be appropriate and on guidance that would facilitate the transition to use of an approved index (including possible guidance with respect to the application of section 411(d)(6)). Any suggestion of an index (and associated margin, if any) should include an analysis of the historical relationship between the index and the rate for 30-year Treasury securities. Comments should be submitted in writing, referencing Notice 96-7, and addressed to--

Associate Chief Counsel
(Employee Benefits and Exempt Organizations)
CC:EBEO
ATTN: Cash Balance Guidance
Room 5214
Internal Revenue Service
1111 Constitution Ave., N.W.
Washington, D.C. 20224

VI. Drafting information

The principal author of this notice is Marjorie Hoffman of the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations). For further information, contact Ms. Hoffman at 202-622-6030 (not a toll-free number).

Notice 96-8, 1996-1 C.B. 359, 1996-6 I.R.B. 23, 1996 WL 17901 (IRS NOT)

(emphasis added)

Revenue Ruling 95-6
1995-4 I.R.B. 22 (Dec. 30, 1994)

MORTALITY TABLE; LIMITATION ON BENEFITS

December 30, 1994

* * *

Section 417(e) - Restrictions on cash-outs.

* * *

ISSUE

What mortality table is the applicable mortality table to be used under § 415(b)(2)(E)(v) and § 417(e)(3)(A)(ii)(I) of the Internal Revenue Code, as amended by § 767 of the Uruguay Round Agreements Act, P. Law 103-465 (GATT)?

* * *

* * *

This revenue ruling provides the applicable mortality table to be used for purposes of adjusting benefits or limitations under § 415(b)(2) and determining the present value of plan benefits under § 417(e)(3) of the Code.

HOLDING

The following mortality table, based upon a fixed blend of 50 percent of the male mortality rates and 50 percent of the female mortality rates from the 83 GAM, is the applicable mortality table for purposes of adjusting benefits or limitations under § 415(b)(2) and determining the present value of plan benefits under § 417(e)(3) of the Code. The table shows, for each age, the number living based upon a starting population of one million lives at age 5 (lx), and the annual rate of mortality (qx).Mortality Table for Sections 415 and 417(e)–

Age	lx	qx
5	1000000.00	0.000257
6	999743.50	0.000229
7	999514.56	0.000210
8	999304.66	0.000199
9	999105.80	0.000195
10	998911.47	0.000195
11	998717.18	0.000201
12	998516.44	0.000209
13	998308.25	0.000216
14	998093.12	0.000224
15	997869.54	0.000233
16	997637.54	0.000241
17	997397.11	0.000251
18	997146.76	0.000261
19	996887.00	0.000272
20	996615.85	0.000283
21	996333.81	0.000297
22	996038.40	0.000310

23	995729.62	0.000325
24	995406.51	0.000341
25	995067.08	0.000359
26	994710.34	0.000378
27	994334.34	0.000398
28	993938.60	0.000422
29	993519.65	0.000446
30	993076.54	0.000475
31	992605.33	0.000505
32	992104.56	0.000538
33	991571.30	0.000574
34	991002.14	0.000614
35	990393.67	0.000668
36	989732.08	0.000705
37	989034.82	0.000751
38	988292.55	0.000806
39	987495.98	0.000873
40	986634.39	0.000952
41	985695.61	0.001043

42	984667.53	0.001151
43	983534.18	0.001278
44	982277.22	0.001426
45	980876.98	0.001597
46	979311.01	0.001794
47	977554.13	0.002014
48	975585.83	0.002252
49	973388.81	0.002509
50	970946.57	0.002778
51	968249.28	0.003059
52	965287.89	0.003352
53	962052.73	0.003659
54	958532.10	0.003988
55	954709.95	0.004336
56	950570.33	0.004711
57	946092.67	0.005121
58	941247.73	0.005581
59	935995.10	0.006103
60	930283.18	0.006700

61	924050.75	0.007383
62	917228.49	0.008172
63	909733.35	0.009080
64	901472.97	0.010127
65	892344.21	0.011328
66	882235.73	0.012698
67	871033.10	0.014242
68	858627.42	0.015966
69	844919.00	0.017869
70	829821.14	0.019958
71	813259.99	0.022241
72	795172.27	0.024765
73	775480.23	0.027581
74	754092.09	0.030740
75	730911.68	0.034295
76	705845.43	0.038286
77	678821.43	0.042715
78	649825.57	0.047569
79	618914.35	0.052837

80	586212.77	0.058508
81	551914.93	0.064570
82	516278.05	0.071006
83	479619.47	0.077798
84	442306.04	0.084927
85	404742.31	0.092377
86	367353.43	0.100370
87	330482.17	0.108870
88	294502.57	0.118004
89	259750.09	0.128107
90	226474.42	0.139029
91	194988.02	0.150645
92	165614.05	0.163045
93	138611.51	0.176292
94	114175.41	0.191504
95	92310.42	0.208253
96	73086.54	0.225097
97	56635.02	0.242999
98	42872.79	0.262351

99	31625.07	0.283670
100	22654.00	0.307186
101	15695.01	0.333156
102	10466.13	0.361975
103	6677.66	0.394472
104	4043.51	0.432808
105	2293.45	0.478674
106	1195.64	0.533916
107	557.27	0.600414
108	222.68	0.680076
109	71.24	0.774845
110	16.04	1.000000

DRAFTING INFORMATION

The principal author of this revenue ruling is Donna Prestia of the Employee Plans Division. For further information regarding this revenue ruling, please contact the Employee Plans Division's taxpayer assistance telephone service at (202) 622-6076 between 2:30 and 4:00 Eastern time (not a toll free number) Monday thru Thursday. Ms. Prestia's number is (202) 622-7377 (also not a toll free number).
Section 417.--Definitions and Special Rules for Purposes of Minimum Survivor Annuity Requirements
The "applicable mortality table" to be used under § 417(e)(3) of the Code, as amended by § 767 of the Uruguay Round Agreements Act, P. Law 103-465, (GATT) is set forth. See Rev. Rul. 95-6, 1995-4 I.R.B. 22, 1994 WL 724190 (IRS RRU)

(emphasis added).

. . . . . .

Black's Law Dictionary 537, 961 (6th ed. 1990)

Equitable. Just; conformable to the principles of justice and right. . . .

* * *

Mandamus /mændéymǝs/. Lat. We command. This is the name of a writ (formerly a high prerogative writ) which issues from a court of superior jurisdiction, and is directed to a private or municipal corporation, or any of its officers, or to an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived. A writ issuing from a court of competent jurisdiction, commanding an inferior tribunal, board, corporation or person to perform a purely ministerial duty imposed by law. . . .

(emphasis added)

Webster's New Collegiate Dictionary 383 (1979)

equitable /'ek-wət-ə-bəl/ *adj* **1**: having or exhibiting equity: dealing fairly and equally with all concerned **2**: existing or valid in equity as distinguished from law **syn** see **FAIR** . . .

. . . . . .

Pertinent Plan Provisions

ARTICLE I
DEFINITIONS

* * *

1.1 "Accrued Benefit" shall mean as of the time of reference, a monthly amount of benefit, payable in the form of an increasing life Annuity, commencing on a Participant's Normal Retirement Date, which increasing life Annuity is the result of dividing the then current value of such Participant's Personal Account by the applicable factor from Section A of Appendix A.

* * *

1.11 "Company" shall mean Bowater Incorporated, a corporation organized and existing under the laws of the state of Delaware.

* * *

1.32 "Normal Annuity form" has the following meaning:

(a) For a Participant who is not married at his Benefit Commencement Date, the Normal Annuity Form is an increasing Annuity for the life of the Participant, the amount of which is determined as follows:

* * *

(b) For a Participant who is married at his Benefit Commencement Date, the Normal Annuity Form is a joint and fifty (50%) percent surviving spouse Annuity.

. . .

* * *

1.33 "Normal Retirement Age" shall mean the day on which the Participant attains his sixty-fifth (65^{th}) birthday.

1.34 "Normal Retirement Date" shall mean the first day of the calendar month coinciding with or next following the Participant's Normal Retirement Age.

* * *

1.4 "Anniversary Date" shall mean January 1.

* * *

1.51 "Trust" as herein used shall mean the legal entity resulting from the agreement between the Employer and the Trustee by which the contributions hereunder shall be made, received, held, invested, reinvested and disbursed to or for the benefit of the Participants or their Beneficiaries, or both, according to the terms of the Plan.

1.52 "Trust Fund" shall mean all funds received by the Trustee, together with all income, profits, gains, losses, or increments thereon.

* * *

2.1(b) The Plan Administrator shall be the Company, the Named Fiduciary for all Plan purposes within the meaning of ERISA.

* * *

ARTICLE IV
EMPLOYER CONTRIBUTIONS

4.1 The Employer shall pay over to the Trustee from time to time the sums of money required to provide the benefits set forth in this Plan.

* * *

4.4 All contributions made to this Plan by the Employer are expressly made upon the condition that such contributions are fully deductible for income tax purposes unless the Employer otherwise specifies in writing. Contributions made by the Employer to the Plan shall be made irrevocably and it shall be impossible for the assets of the Plan to inure to the benefit of the Employer or to be used in any manner other than for the exclusive purpose of providing benefits to Participants, retired Participants and Beneficiaries, and for defraying reasonable expenses of administering the Plan . . .

ARTICLE VI
PARTICIPANTS' PERSONAL ACCOUNTS

6.1 A Personal Account shall be established and maintained for each Participant to which credits shall be made in accordance with the provisions of this Article VI. The Personal Accounts established and maintained pursuant to this Article VI are intended to be bookkeeping accounts. . . .

* * *

ARTICLE VIII
DEATH BENEFITS

8.1 If a Participant dies prior to his Normal Retirement Date, then no benefit of any kind shall be payable from this Plan and Trust **except for** the death benefit (if any) provided for in this Death Benefits Section. The amount of the Participant's death benefit shall be the then vested present value of the Participant's Accrued Benefit accrued to date of death; provided, however, that a Participant who dies while an Employee of the Employer shall be fully vested in the present value of his Accrued Benefit accrued to date of death. The amount of such benefit shall be actuarially reduced for early commencement. This death benefit shall not be less than the qualified preretirement survivor annuity (if applicable) for the Participant's spouse as required in the Annuity Requirements Section. If a Participant dies after payment of his Accrued Benefit has commenced, then any death benefit, if applicable, shall be governed by the method of payment applicable to the Participant.

8.2 With respect to any death benefit hereunder, the Participant during his lifetime shall have the right, which may be successively exercised by written instrument filed with and received by the Plan Administrator prior to the Participant's death and bearing the signature of at least one (1) witness, to designate a Beneficiary or Beneficiaries, or to change his designated Beneficiary; provided, however, that the primary designated Beneficiary of a married Participant shall be the

Participant's spouse unless the spouse has consented in writing to a nonspouse Beneficiary. Such consent shall acknowledge the specific nonspouse beneficiary, including any class of Beneficiaries or any contingent Beneficiaries. Such consent must be witnessed by a Plan representative or a notary public. In the event the designated Beneficiary or Beneficiaries are not living at the death of the Participant, or if an unmarried Participant has not designated a Beneficiary, the death benefit shall be payable to the Participant's estate. Payment of any death benefit shall be made after taking into consideration the Annuity Requirements Section and the Distribution Requirements Section.

(emphasis added)

* * *

ARTICLE XII
DISTRIBUTION REQUIREMENTS

12.1 Except as otherwise provided, the requirements of this Article XII shall apply to any distribution of a Participant's Accrued Benefit. . . .

* * *

(b) If the Participant terminates employment prior to his Early Retirement Date, the Participant's Accrued Benefit shall be distributed as soon as administratively feasible after the second Anniversary Date coinciding with or next following his Severance Date.

* * *

12.2 Subject to Article XI, a Participants' Accrued Benefit may only be distributed in one of the following forms of payment as the Participant directs the Trustee after the Participant is otherwise eligible for payment, and each such form of payment shall be the Actuarial Equivalent of the Normal Annuity Form:

* * *

(b) A single lump sum payment equal to the amount credited to the Participant's Personal Account as of the end of the month preceding his Benefit Commencement Date.

ARTICLE XVII
MISCELLANEOUS PROVISIONS

17.1 The adoption and maintenance of this Plan shall not be deemed to constitute a contract, expressed or implied, between the Employer and any Employee or to be a consideration for, or inducement or condition of, the employment of any person. . . .

. . . . . .

BOWATER INCORPORATED

55 East Camperdown Way
Post Office Box 1028
Greenville, SC 29602-1028
864/271-7733

BOWATER

June 14, 2001

Mr. Frank J. Crosby
HC 74, Box 250
Millinocket, Maine 04462

Re: Claim for Benefits under Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper, Inc. (the "Plan")

Dear Mr. Crosby:

This letter responds to your appeal of a prior decision made by Aaron Whitlock, acting on behalf of Bowater Incorporated as Plan Administrator under Section 2.4 of the Plan, regarding the present value calculation of your lump sum benefit under the Plan.

The Pension Administrative Committee ("PAC") met on June 12, 2001 to review and evaluate your appeal. The PAC understands that you request that pre-retirement mortality factors should be disregarded in calculating the present value of your benefit under the Plan. The PAC further understands that the basis for your request is an example set forth by the IRS in a document it released pertaining to cash balance plans designated "Notice 96-8." For the reasons described in this letter, the PAC finds that the prior decision was correct, and hereby denies your appeal.

Introduction

Your appeal is governed by the Plan, and provisions of the Employee Retirement Security Act of 1974, as amended, and the Internal Revenue Code of 1986, as amended (the "Code"). Under the Plan, the PAC has the exclusive discretion to construe and interpret the Plan (the PAC's interpretation thereof in good faith to be final and conclusive); to decide all questions of fact concerning the Plan, to determine eligibility for participation in the Plan, to compute the amount of benefits and to determine the person or persons to whom such benefits shall be paid. (See Plan Sections 2.4 and 2.6). All action by the PAC is by a majority of its members. (See Plan Section 2.7.)

In your claim for benefits under the Plan, you requested that your lump sum benefit be calculated using the "whipsaw" method. The Plan Administrator granted your request and calculated your benefit in accordance with the whipsaw method. This method involved the following three general steps:

(1) Your Personal Account balance under the Plan as of your date of distribution was projected forward to your Normal Retirement Date at the plan's Periodic Adjustment Percentage. Because of a change in the Periodic Adjustment Percentage as of January 1, 2000, two projections were made using both the prior Periodic Adjustment Percentage (the PBGC rate plus 75 basis points) and the current Periodic Adjustment Percentage (the GATT rate at the time of calculation). The Plan used the Periodic Adjustment Percentage that produced the larger projected accrued benefit.

(2) The projected amount was then converted to an increasing life annuity (the Plan's normal form) by dividing the Personal Account at Normal Retirement Age by the appropriate annuity factor. Similar to step one, due to a

change in the applicable annuity factor from 210 to 225 effective as of January 1, 2000, two conversions were performed using both the prior and current annuity factor. Again, the Plan used the factor that produced the larger annuity.

(3) The lump sum amount was then determined by calculating the present value of the annuity using the prescribed interest rate and mortality table as set forth in Code Section 417(e).

In your appeal, we understand that you are challenging the use of mortality factors in step 3. In this regard, we believe that you accept that it is appropriate to apply mortality factors for periods after age 65, but that those factors must be disregarded before age 65 (i.e., that "pre-retirement mortality factors" must be disregarded). We understand that you rely on the following example contained in IRS Notice 96-8 as the basis for your appeal. The example states:

> A cash balance plan provides for interest credits at a fixed rate of 8% per annum that are not conditioned on continued employment, and for annuity conversions using the section 417(e) applicable interest rate and mortality table. A fully vested employee with a hypothetical balance of $45,000 terminates employment at age 45 and elects an immediate single sum distribution. At the time of the employee's termination, the section 417(e) applicable interest rate is 6.5%.
>
> The projected balance of the employee's hypothetical account as of normal retirement age is $209,743. If $209,743 is discounted at age 45 at 6.5% (the section 417(e) applicable interest rate), the present value equals $59,524.

> Accordingly, if the plan paid the hypothetical account balance of $45,000, instead of $59,524, the employee would receive $14,524 less than the amount to which the employee is entitled.

IRS Notice 96-8, I.R.B. 1996-6, February 5, 1996, Section II.A.

The PAC understands your contention to be that, because this example does not mention or use the prescribed mortality table under Code Section 417(e) to determine the present value of the employee's normal retirement benefit, you believe that it provides a basis for your position that pre-retirement mortality factors should be disregarded in the present value calculation of your benefit described in step three above.

For the reasons describe below, the PAC has concluded that the whipsaw methodology used in connection with your claim was correct, and Notice 96-8 does not change that result. Further, even if the example provided in the Notice did stand for the proposition that pre-retirement mortality factors had to be disregarded (which it does not), it would not be binding authority and cannot be relied upon to grant your request to calculate, in the third step above, present value using only the Code Section 417(e) interest rate and to disregard pre-retirement mortality factors in this calculation.

Discussion

1. Code Section 417(e)

Code section 417(e) unambiguously mandates that the present value of an accrued benefit cannot be less than the amount determined using the "applicable interest rate" and the "applicable mortality table," both defined in Code Section

417(e).[1] Treasury regulations promulgated under Code Section 417(e) are equally clear in providing that the prescribed mortality table (and interest rate) are used to calculate the present value of an accrued benefit and a plan must include such a provision.[2] See Treasury Regulation Section 1.417(e)-1(d). Neither the Code nor the regulations contemplate that mortality factors should be disregarded for all or part of the present value calculation.

Under the regulations, the IRS is given the authority to prescribe the applicable mortality table through notices or revenue rulings, and the provide rules that apply t o a change to the IRS's standard table for determining reserves for group annuity contracts. See Treasury Regulation Section 1.417(e)-1(d)(2). However, the IRS was not delegated the authority to override or modify the statutory requirement under which mortality factors are used in the entire present value calculation.

2. *IRS Notice 96-8*

The IRS issued Notice 96-8 to provide administrative guidance for cash balance plans in calculating the present value of a participant's accrued benefit without violating Code Sections

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[1] Code Section 417(e)(3) provides, in relevant part, "[P]resent value shall not be less than the present value calculated by using the applicable mortality table and the applicable interest rate."

[2] Treasury Regulation Section 1.417(e)-1(d)(1) provides, "A defined benefit plan must provide that the present value of any accrued benefit and the amount (subje o sections 411(e)(3) and 415) of any distribution, including a single m, must not be less than the amount calculated using the applicable interest rate described in paragraph (d)(3) of this [Regulation Section 1.417(e)-1] (determined for the month described in paragraph (d)(4) of this [Regulation Section 1.417(e)-1] and the applicable mortality table described in paragraph (d)(2) of this [Regulation Section 1.417(e)-1]."

411(a) and 417(e). The IRS set forth the example described above to illustrate how a cash balance plan may violate these sections if the plan provides for an interest crediting rate that is greater than the prescribed interest rate under Code Section 417(e). In this circumstance, the hypothetical account balance produced by the plan's interest crediting rate will produce a smaller amount than that produced under the whipsaw method using the lower interest rate prescribed by Code Section 417(e). The example shows how the whipsaw method avoids this problem, and focused solely on the amounts produced by the plan's interest crediting rate and the interest rate prescribed by Code Section 417(e). The illustration was not addressing mortality assumptions in any respect; thus, the IRS did not incorporate mortality factors when calculating the present value of the benefit in its illustration of this potential problem.

However, upon a further reading the Notice makes it clear that this example was designed solely to illustrate how a cash balance plan's use of an interest crediting rate that is higher than the Code Section 417(e) prescribed interest rate will lead to a violation of Code Section 417(e). It was not designed to establish an alternative method for calculating present value under Code Section 417(e) by disregarding mortality factors, either altogether or just pre-retirement. In fact, at another point, the Notice provides that "a single sum distribution optional form of benefit equal to the hypothetical account balance will satisfy section 417(e) only if the single sum distribution is not less than the present value of the employee's accrued benefit calculated in accordance with the applicable interest rate and mortality table under section 417(e)(3)." See IRS Notice 96-8, Section III.B.2. This statement is consistent with Code Section 417(e), and reflects the IRS's views that mortality factors are considered in the entire present value calculation.

3. *Notice 96-8 as Binding Authority*

The IRS issues notices to provide administrative guidance on the application of the IRS' interpretation of the Code and related regulations. IRS notices are and have been cited as authority of the IRS' interpretation of Treasury regulations.[3] However, administrative guidance cannot be given authoritative weight if it is "plainly erroneous or inconsistent with the regulation." See Stinson v. United States, 508 U.S. 36, 45 (1993) (quoting Bowles v. Siminole Rock & Sand Co., 325 U.S. 410, 414 (1945))). If, by failing to use pre-retirement mortality factors in the benefit example described above, the IRS had been attempting to issue a ruling to the effect that pre-retirement mortality factors should be disregarded, it would have been promulgating an interpretation that is inconsistent with a regulation. As noted above, neither the Code nor the regulations promulgated under Code Section 417(e) give the IRS authority to determine whether or not mortality factors may be used in a present value calculation of an accrued benefit.

By its own terms, the Notice limits its authoritative effect.[4] In the Notice, the IRS stated it was seeking comments in anticipation of proposed regulations that would provide

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[3] Both the Second Circuit in Esden and the Eleventh Circuit in Lyons recognized that Notice 96-8 is authoritative for the appropriateness of the whipsaw method in performing lump sum calculations under cash balance plans. Specifically, the Second Circuit expressly deferred to the IRS' interpretation of the Treasury Regulations promulgated under Code Sections 411(a) and 417(e) in its decision. See Esden, 229 F.3d at 168-172.

[4] The Eleventh Circuit in Lyons recognized the somewhat limited effect of IRS Notice 96-8 when it stated, "according to Notice 96-8 itself, its purpose was not to promulgate beinind grules, but to elicity opinions on 'anticipated reulgations.'" See Lyons, 221 f3d at 1250.

standard indices and margins that could be used as interest crediting rates in cash balance plans and be assumed to not exceed the applicable interest rate under Code Section 417(e). See IRS Notice 96-8, Sections IV and V.

In its example, the IRS mistakenly appeared to apply Code Section 417(e) by not including mortality factors. Read in context, the example does not establish a rule that pre-retirement mortality factors should be disregarded. Even if it did, because this approach to calculating present value under the Whipsaw method could be directly contrary to the Code and the regulations promulgated thereunder, the example in Notice 96-8 would not override the clear mandate of the statute and must be disregarded.

After reviewing your appeal, the PAC finds that the decision by the Plan Administrator was correct and that pre-retirement mortality factors can be applied in calculating the present value of your benefit under the Plan.

* * *

This letter constitute a denial of your claim on appeal, and is final and binding on you. The decision on your claim, as set forth in Mr. Whitlock's letter of February 12, 2001, is also final and binding on you.

On behalf of the PAC:

/s/ David G. Maffucci
David G. Maffucci
Chairman

AFFIDAVIT OF FRANK J. CROSBY

1. My name is Frank J. Crosby.

2. The facts asserted herein are true and accurate to the best of my knowledge, information and belief, and I am competent to testify to such facts.

3. I am the plaintiff and named representative for the putative Class in the following action: Crosby v. Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper Inc., No. Case No. 1:01CV683 (Hon. Richard Alan Enslen; Mag. Ellen S. Carmody).

4. I offer this affidavit in support of my motion for class certification.

5. I became a salaried employee of Great Northern Paper, Inc. ("GNP") on November 17, 1980.

6. On August 17, 1999, Bowater Inc. sold GNP to Inexcon, Inc. ("Inexcon").

7. Simultaneous with the sale of GNP to Inexcon, my employment with Bowater was terminated. However, I remained and still remain an employee of GNP.

8. During my tenure with GNP, I have held various engineering and maintenance management positions.

9. At or about the time Bowater sold GNP to Inexcon, all other salaried employees of GNP were also terminated from employment with Bowater. Most of these individuals remained and still remain salaried employees of GNP. In fact, I have developed and maintained a list, albeit incomplete, of 128 of these employees.

10. On September 16, 2002, Eva Cantarella ("Ms. Cantarella"), one the attorneys representing me in the above-referenced action, telephoned me to discuss defendants' contention that the putative Class was not sufficiently numerous so as to permit the Class to be certified.

11. I relayed to Ms. Cantarella the information in ¶9 and further advised her that, around the time I received my lump sum from the Plan (on or about January 1, 2001), several of my co-workers at GNP mentioned to me that, too, had requested and received a lump sum from the Plan.

12. I also told Ms. Cantarella that, at or about the time Bowater notified me that it had granted my request to have my lump sum recalculated, and that I was eligible for an increased lump sum, several of my co-workers at GNP who were aware of my administrative claim, stopped by my office to thank me and tell me that they, too, had received notification that they were eligible for an increased lump sum. In fact, 3 of those individuals were so grateful that my efforts had benefitted them that they each presented me with a bottle of wine.

13. The timing of the notification received by my co-workers suggested to me that Bowater had recalculated their lump sums in the same manner that it had recalculated my lump sum; that is, using a preretirement mortality discount.

14. Before Ms. Cantarella and I concluded our telephone conference on September 16, 2002, I advised Ms. Cantarella that I would personally contact a number of my past and

present co-workers in an effort to ascertain how many of them had taken a lump sum from the Plan.

15. Later that same day and also on the following two days, I personally contacted 35 of my co-workers at GNP (most face to face), and one former GNP co-worker, and learned (or confirmed) the following:

A. All 36 had participated in the Plan.

B. 32 of the 36 had requested and received a lump sum distribution from the Plan, while the remaining 4 elected to leave their benefit in the Plan.

C. The 4 individuals who elected to leave their benefit in the Plan stated that they intend to take their future distribution from the Plan in a lump sum form.

D. 28 of the 32 who requested and received a lump sum recalled that they subsequently received notification that they were eligible for an increased lump sum, and that they received this notification around February 2001; that is, about the time Bowater notified me that it had granted my request to have my lump sum recalculated and advised me that I was eligible for an increased lump sum.

E. 24 of the 28 individuals who recalled receiving notification that they were eligible for an increased lump sum, requested and received a supplemental lump sum (the increase), while the remaining 4 elected to leave the increase in the Plan.

F. The 4 who elected to leave the increase in the Plan stated that they intend to take their future distribution from the Plan in a lump sum form.

16. I have elected to leave my increase (i.e., the supplemental lump sum I was offered pursuant to Bowater's initial decision on my administrative claim) in the Plan at least until the dispute on the mortality decrement issue is resolved. However, I intend to take my future distribution from the Plan in a lump sum form.

17. During the course of this litigation, many of my co-workers at GNP who were participants in the Plan have asked me about the status of this litigation. To the best of my abilities, I have apprised them of the various proceedings and this Court's rulings.

18. The significant interest in this litigation expressed by my co-workers at GNP who were participants in the Plan suggests to me that, if the putative Class is not certified, these individuals will pursue their own claim for additional benefits based on Bowater's erroneous use of a preretirement mortality decrement.

Further affiant sayeth not.

s/ Frank J. Crosby
Frank J. Crosby

Subscribed and sworn to before
me this 30th day of September, 2002

s/ Sharon L. Doe
Notary Public

Sharon L. Doe
My Commission Expires
September 20, 2004

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK J. CROSBY, individually and on behalf of all others similarly situated,
Plaintiff-Appellee,
vs.
BOWATER, Incorporated, et. al.,
Defendants-Appellants.

The transcription of oral argument on April 20, 2004, for the Sixth Circuit Court of Appeals, Case No. 03-1044, transcribed by Therease M. Headley, CSR-2266, Notary Public in and for the County of Oakland, State of Michigan.

APPEARANCES:

MR. THOMAS PISKORSKI, ESQ.

MS. EVA T. CANTARELLA, ESQ.

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(Introductory comments by the Clerk inaudible.)

MR. PISKORSKI: Good morning, Your

Honor. May it please the Court, my name is Thomas Piskorski. I appear on behalf of the Defendants-Appellants.

I think it might be valuable for me to lay out some principles at the outset that I believe Plaintiffs agree with (noise over).

The first one being that the one sum amount calculated -- and I'll just refer to Mr. Crosby for ease of references rather than "participant" or things like that. The lump sum benefit calculation for Mr. Crosby satisfies ERISA's and the Internal Revenue code's minimal requirements. There is no dispute that we satisfy the minimum requirements of those statutory requirements.

Secondly, Plaintiffs agree and concede that it is okay for a retirement plan, like the plan in this case, to use pre-65 mortality in calculating the present value of the accrued benefit under a retirement plan.

JUDGE NELSON: It's okay if the plan says so.

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MR. PISKORSKI: That's exactly right, Your Honor. But in terms of a premise, they are saying it's okay to have it structured that way. Their point, as Your Honor has noted, is that somehow the retirement plan in this case somehow either expressly or implicitly changed that to provide the pre age 65 mortality would not be counted.

UNIDENTIFIED: Why wasn't it your duty to say it could be?

MR. PISKORSKI: I'm sorry, Your Honor?

UNIDENTIFIED JUDGE 1: Why wasn't it your burden to explain that it could be calculated with the pre-retirement mortality?

MR. PISKORSKI: Well, because our position under the plan, by the definitions of accrued benefit and actuarial equivalence, we are to take into

account mortality both pre and post age 65. So, we never, in terms of the administrative process, there was never a need to directly respond to that point. That point was never really made as part of the claim of Mr. Crosby.

I hope I've answered your question.

JUDGE NELSON: I think it's being made now.

MR. PISKORSKI: I'm sorry, Your Honor?

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JUDGE NELSON: I think it's being made now.

MR. PISKORSKI: I agree. And I'll get to the death benefit argument that their whole case turns on.

In responding subsequently, it's important to highlight that this is a claim, notwithstanding all the paper that's been filed and all the statutes and regulations cited, this really involves the interpretation and application of a benefit plan. How is a lump sum supposed to be calculated under the retirement plan in this case?

That's a run-of-the-mill or regular, albeit complicated somewhat, but it's a regular benefit claim that is subject to an arbitrary and capricious standard of review, and whether the plan administrator's decision in calculating Mr. Crosby's lump sum is properly supported by the Plaintiff.

JUDGE NELSON: Well, that's certainly true if the administrator is interpreting the provisions of the plan. But as I understand your opponent's argument, in this case the administrator misinterpreted the law, didn't purport to interpret the provisions of the plan, but misconstrued the law and came up with this result, and therefore our review

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is de novo because we, in theory, if not always in practice, are as well equipped to know what the law is

as anyone else is.

MR. PISKORSKI: No, I don't think that's their position, Your Honor. I believe their position, as I understand it in their briefs, both here and in the lower court, was that the death benefit provision in Section 8.1 of the plan somehow changed the calculation formula so that pre age 65 mortality should not be considered.

Their case says that Section 8.1 changes the normal mortality consideration. So, their claim and their argument is grounded entirely on the language of the benefit plan. And our position is, that simply means --

UNIDENTIFIED: What's your response to Judge Nelson's question? The debate below was about what ERISA requires or doesn't require. It's no indication that you were invoking your right to interpret the plan and therefore getting a deference you might otherwise get.

MR. PISKORSKI: Oh, no, Your Honor. We repeatedly argued to the district court that this was a benefit claim under the terms of the plan which triggered --

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JUDGE NELSON: But what did the committee rest its decision on?

MR. PISKORSKI: The committee rested its decision on the accrued benefit provision, that language, Section 1.1, the actuarial equivalence provision of Section 1.2, and the lump sum or the distribution provision of Section 12. The plan administrator looked at the plan as a whole and concluded that the plan as a whole allows and provides for the consideration of pre age 65 mortality in calculating the amount of the lump sum.

UNIDENTIFIED JUDGE 2: But did he not also then, because he did make some changes as a result of the law. What they said the plan required

in the end wasn't what you voluntarily did. You changed your mind based on the law. And why isn't it fair to say that they also interpreted the law as allowing them to make this pre-retirement mortality discount? Because if the law didn't permit them to do it, then they wouldn't have done it, just the same as the other half of their decision.

MR. PISKORSKI: But the law does permit them to consider it.

UNIDENTIFIED JUDGE 2: So, we're considering what the law is.

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MR. PISKORSKI: Yes and no. In the sense that -- but you are also back to asking yourself how do you calculate Mr. Crosby's lump sum? And the plan tells you how to do that. Obviously, there may be some legal parameters that have to be satisfied, but ultimately it turns on what does the plan say.

JUDGE NELSON: Well, what the plan says is that he gets the cash balance, which, as I understand it, you concede isn't in accordance with the law.

MR. PISKORSKI: That's right. And under the plan, the plan administrator is to construe and apply the plan in accordance with ERISA's requirements. And there were developments with respect to these types of retirement plans that caused the plan administrator to say that in my administration of the plan, because I have an obligation to make sure that we satisfy any legal requirements, I need to modify that provision so that I do the whipsaw calculation. Because you're right, Your Honor, the plan did not provide for that. The plan simply said whatever's in your account, that's your benefit. That was incorrect, based on legal developments.

So, the plan administrator took that

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into consideration and said, "I have an obligation under my fiduciary obligations under the plan, to perform the calculation in accordance with this new legal development. However, that doesn't change the ultimate question of how do I calculate the present value of Mr. Crosby's accrued benefit. There the plan still controls. And the plan specifies how any present value calculation is supposed to be performed.

UNIDENTIFIED JUDGE 1: What seems strange about it, invoking deference, is you have this acknowledgment that the cash balance calculation under the plan is illegal. Everyone agrees with that. We then make a correction and say okay, now we have to apply this whipsaw calculation, but we are now being asked to give deference to your administration of a part of the plan that was illegal. That seems very strange.

MR. PISKORSKI: But the administration of our part of the plan, Your Honor, turns on Sections 1.1 and 1.2, the definitions of accrued benefit and the definition of actuarial equivalence. That is what this case is about.

The provision that was unacceptable to the plan administrator, based on the legal developments, was 12.2, I forget what the subsection

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is, I think it was (b). That's the provision the plan administrator said doesn't hold up anymore. But in terms of the rote calculation, the plan does control it because you're talking about how do you present value this life annuity that Mr. Crosby would be entitled to receive upon reaching age 65. There the pian --

JUDGE NELSON: And he's not entitled to receive it if he doesn't reach age 65; is that correct?

MR. PISKORSKI: Yes, sir. Yes, sir.

UNIDENTIFIED JUDGE 1: Well, wait. If

he had died at age 43, he would have gotten exactly what he now thinks he's owed with no pre-retirement mortality.

MR. PISKORSKI: He would not have gotten that --

JUDGE NELSON: His widow would have got a death benefit.

UNIDENTIFIED JUDGE 1: Well, right. But that would not have diminished it.

MR. PISKORSKI: No. But Section 8.1, the death benefit provision, specifically says that the beneficiary's amount of death benefit is based on Mr. Crosby's accrued benefit. They calculated Mr.

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Crosby's accrued benefit. Under the terms of the plan 1.1 and 1.2, he would consider both the interest rate and the mortality.

UNIDENTIFIED JUDGE 1: So, you are saying -- you are claiming you would be consistent here. In other words, had his spouse or beneficiary collected at age 43, the same thing, it would have been the exact same calculation, in your opinion?

MR. PISKORSKI: Yes, sir. Because 8.1 specifies that the amount of the beneficiary's money benefit, the death benefit, is based on Mr. Crosby's accrued benefit at that time.

JUDGE NELSON: Is that an incidental death benefit?

MR. PISKORSKI: That is our position, Your Honor, based on the regulations. This type of death benefit, albeit it, it gives the beneficiary literally the same amount as Mr. Crosby would have received, our position is under the law that that still constitutes a incidental death benefit, which means it's not an accrued benefit, which means the plan or plan sponsor could have amended the plan at any time to either eliminate or reduce the amount of the death benefit.

25 The district court converted the death
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1 benefit into an accrued benefit. And if you look at
2 the definition of accrued benefit under plan Section
3 1.1, that finding is simply incorrect. The death
4 benefit is not an accrued benefit.
5 JUDGE NELSON: So, your position is
6 that the death benefit is an ancillary benefit not
7 directly related to retirement benefits?
8 MR. PISKORSKI: Yes, sir. But the
9 reason is because the retirement benefit -- the core
10 benefit under the plan goes to Mr. Crosby.
11 JUDGE NELSON: Right.
12 MR. PISKORSKI: The death benefit goes
13 to some other person that Mr. Crosby and any other
14 participant is entitled to designate. So, talk about
15 two different people with two different rights.
16 Whereas in this case, talking about the calculation of
17 Mr. Crosby's accrued benefit.
18 UNIDENTIFIED JUDGE 2: But when you say
19 it's a different person with a different right, but
20 that right is wholly derivative of his right to
21 designate. That is, the spouse, you know, unlike some
22 types of spousal benefits where the spouse has an
23 independent right to get that benefit, here the right
24 is wholly derivative and dependent on his having
25 designated the person; is that right?
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1 MR. PISKORSKI: Yes, sir.
2 UNIDENTIFIED JUDGE 2: And I just
3 wanted to confirm that your position is that if this
4 lawsuit had never happened and he had died the day he
5 was laid off or the day before he was laid off, the
6 amount you would have given the spouse would have
7 been the 52 thousand and change that you offered him?
8 MR. PISKORSKI: Yes. Under the
9 language of 8.1, that beneficiary would be entitled to
10 Mr. Crosby's accrued benefit. And the accrued

benefit, as we've calculated it, under the terms of the plan, primarily the actuarial equivalence provision, comes up to the 52 grand and --

UNIDENTIFIED JUDGE 2: Okay. Let me ask you this and maybe this is -- I'm trying to understand this in a common sense way and it's obviously not very easy.

In a common sense way, you have a reduction for pre-retirement mortality. I would have thought because if a person's gonna die then you're not going to have to pay him this annuity on out into the future. Okay. But if instead of paying him you're gonna pay the designee, his spouse, why isn't it in effect exactly as though he were still living?

MR. PISKORSKI: Because you pointed out

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UNIDENTIFIED JUDGE 2: He doesn't get it, she gets it.

MR. PISKORSKI: Yeah. But your way you use the word "derivative." It is based on Mr. Crosby's accrued benefit. And the plan language, as most plans do, they calculate that benefit taking into account mortality and interest. That's just the way the calculations work.

UNIDENTIFIED JUDGE 2: Okay. But in effect, the amount we're fighting over for Mr. Crosby, which is five thousand, plus or minus a little, in effect that's the actuarial value to the spouse of the chance of getting the benefit if the man dies?

MR. PISKORSKI: Yes, sir.

UNIDENTIFIED JUDGE 2: Is that fair?

MR. PISKORSKI: Yes, that is fair.

JUDGE NELSON: What do you say about the argument that 13 actuarial firms, including yours, told the IRS or somebody that normally these cash benefit plans don't apply the decrement prior to normal retirement age?

MR. PISKORSKI: I think if you read the actuarial literature that was submitted with this report, I think the best you can conclude is the

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actuarial authority is split. And we pointed out in our briefs that this very, some of the very papers, or the authors of the papers that were submitted to the district court, later submitted affidavits in another litigation saying "that's not our position. Our position is it's okay to consider it."

Granted, I think one of the papers said generally it's not taken into account, but the fact of the matter is the actuarial authorities are split on it. And the papers, if you read them carefully and we covered in our briefs, Your Honor, at best it's a mixed result. Maybe slightly in favor of not considering it. But it's all over the place.

And the affidavits that were submitted by some of the authors really crystallized that. There's a significant dispute about what actuarially might be appropriate. But all of that really doesn't have any bearing because what these actuaries may say doesn't matter. It's what our plan says. And our plan says we will take into account mortality without any exclusion for pre age 65 mortality. It just says mortality and interest.

I've used up my time. I thank you, Your Honors.

MS. CANTARELLA: Good morning, Your

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Honors. Eva Cantarella for Frank Crosby and the rest of the class.

ERISA Section 203a, commonly known as the anti-forfeiture rule, provides, it requires, it mandates that participants have a nonforfeitable right to one hundred percent of their vested accrued benefit, subject only to an expressed plan provision which states that the benefit will be forfeited on

account of the death of the participant.
Treasury regulation 1.411a-4a enforces ERISA Section 203a. And what it says, in order for a benefit, an accrued benefit to be nonforfeitable it must be an unconditional right. And in addition, says that unreasonable actuarial reduction can result in accrued rights being forfeited.
Now, as Your Honors correctly note, the plan does provide that the annuity, which commences at age 65, is only payable for life. So, we recognize the propriety of a post-retirement mortality.
Article 8 of the plan, however, and I do agree with Mr. Piskorski, that it is a very highly relevant provision, but it was not interpreted by Bowater, the plan administrator, in the administrative proceedings.
Article 8 says, "If the participant

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dies before normal retirement age, no benefit of any kind shall be payable under this plan except for the death benefit under this section.
Article 8 then --
JUDGE NELSON: Which is not a vested interest, as I understand it.
MS. CANTARELLA: Well, the plan itself says it's a vested accrued benefit. In fact, it --
JUDGE NELSON: Well, the plan could be amended tomorrow to do away with the death benefit, could it not?
MS. CANTARELLA: Not under Treasury Regulation 1.411d-4, question and answer 2a4 expressly states that "code section 411d-6 protected benefit" -- these are accrued benefits and any optional form thereof -- "may not be eliminated merely because they are payable to a spouse or other beneficiary."
JUDGE NELSON: You used the word "protected benefits". Is that a term of art that's different from vested benefits?

MS. CANTARELLA: The protected benefits -- Code Section 411d-6 is the code analog to ERISA's anti-cutback rule. And what both of those rules will say is that you cannot adopt a plan amendment that cuts back, reduces or eliminates an accrued benefit or

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any optional form of the accrued benefit, retirement type subsidy and early retirement type benefits. That's what a protected benefit is.

And if you look at the Treasury regulations under 1.411d-4, which is what I just cited, it goes on and on and reiterates over and over again that protected benefits are those under the anti-cutback rules.

So, here we have a regulation right on point that says that protected benefits, which include accrued benefits, and any optional form thereof, cannot be eliminated merely because they are payable to a spouse or other beneficiary.

UNIDENTIFIED JUDGE 1: I just want to understand your answer to Judge Nelson's question, then, is that five years down the road they could not eliminate this death benefit?

MS. CANTARELLA: Exactly. That's what the Treasury regulation says. I think the Treasury regulation is crystal clear on that point. And I also think that ERISA Section 203a is clear on that point, that where the plan does not expressly provide for the forfeiture of a benefit -- and here the plan provides just to the contrary. Article 8 says except for this death benefit. And then it explains that the death

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benefit is the participant's death benefit. And it is the vested present value of the participant's accrued benefit.

JUDGE NELSON: You can take it with you.

MS. CANTARELLA: Yes, you can. And

that is an integral feature of cash balance plans. They are touted by employers for their portability. If you leave the company, you can port your benefit with you.

JUDGE NELSON: Let's assume, just for purposes of analysis, that you carried the day completely on this issue.

Why are you entitled, having regard to the section under which you brought this action, to a money judgment?

MS. CANTARELLA: We are relying on Great West Life and Annuity versus Nudson (ph) and Harris Trust Savings Bank versus Salomon, Smith, Barney for this proposition. Both cases explain that if the Defendant is holding monies that rightfully belong to the Plaintiff, and has earned any profits on those monies, then a constructive trust may be imposed over those funds.

JUDGE NELSON: Well, this cash balance

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plan, as I understand it, doesn't segregate discrete rees, it simply provides for a claim against the general assets of the plan; is that not so?

UNIDENTIFIED JUDGE 1: And doesn't that take you outside of the Nudson?

MS. CANTARELLA: The plan is holding money that should have been paid to the class members, okay? And I doubt -- my reading of Nudson and Harris Trust is if the Defendant is holding monies that rightfully belong to the Plaintiff, then a constructive trust can be imposed and equitable --

JUDGE NELSON: You have a shows in action against the plan, but you don't have a segregated fund that's yours, and that a court of equity would treat as its special province, as it were.

MS. CANTARELLA: My understanding or my reading of Nudson and Harris Trust is that you don't

need to have these monies in a separate trust account. A pension plan can have many different trusts. There is nothing in ERISA or the (inaudible) requiring that everything be in one trust, but it must be in a qualified, tax qualified trust. But I don't read Nudson or Harris Trust as saying that, you know, the monies have to be in a separate fund. Here we can, through simple mathematical calculation, identify the amount that was wrongfully withheld and is still in the plan.

And this also benefitted Bowater, because it meant that Bowater didn't have to make as many contributions to the plan in order to keep it sufficiently funded.

JUDGE NELSON: How does that differ from the claim that any contracting party has when there is a breach of contract? And in many breach of contract cases, it's very easy to calculate the exact amount of the damages. But courts of equity don't award judgments for money, do they?

MS. CANTARELLA: Well, I think, you know, in Great West, explained that the nature of the claim there was based on contract. There was a specific provision in the plan, a reimbursement provision, and so looked at that as being a contract type provision. We really don't have a provision in this plan that says if we make a mistake and we miscalculate your benefit, this is the provision that you can look to and this is the provision that you can recover under.

And I think this is kind of important because Mr. Crosby could not recover under the terms of the plan. The Section 12. --

UNIDENTIFIED JUDGE 2: I thought your whole computation, though, I mean your whole argument was that the plan properly interpreted in

accordance with the law, which they agreed is what they should do, does give you exactly this 57 thousand and change, which is what you want.

MS. CANTARELLA: The --

UNIDENTIFIED JUDGE 2: I mean, the law standing alone doesn't give you a right to it. It's only the plan to the extent that it incorporates the law, doesn't it?

MS. CANTARELLA: I think with every statutory interpretation -- statutory violation claim there's going to be some plan interpretation. But Mr. Crosby could not, as Mr. Piskorski says, he could not recover under 12.2. That's the plan's lump sum provision, because it says if you elect a lump sum, you're going to get your account balance. That's what he got, so he obviously couldn't --

UNIDENTIFIED JUDGE 2: Well, he got more than his account balance, he got his account balance in it as modified for the law as read by your adversary. That's why we were working him over about what's the standard of review.

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MS. CANTARELLA: Right.

UNIDENTIFIED JUDGE 2: And for you to prevail on the standard of review question, you want the law brought in, don't you?

MS. CANTARELLA: Right. But again, we also could not recover under the plan's death benefit provision because the death benefit isn't payable until the participant is dead.

UNIDENTIFIED JUDGE 2: Let me go back a second to this question about the money judgment.

Even if we agreed that the money, as he has paid it in, and as interest credits or interest has accrued on it, even if we agreed that that was in some way a fund in being, that's not what you want, because that's what they offered you in the beginning, that this extra money -- it's purely hypothetical,

isn't it? It's a computation of what he ought to get because they ought to pay it to him, not because he's ever put it in, or that it's ever directly accrued. It's a result of this future hypothetical whipsaw calculation, isn't it?

MS. CANTARELLA: Which is required under the terms of the plan.

UNIDENTIFIED JUDGE 2: Well, it may be required under the terms of the plan, but I'm asking

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the equitable, legal question. In the same way that it, you know, I give somebody to hold for me a hundred cattle and we have a contract that says every month you keep them you've got to give me back another cow, and after six months I come in and say I want my hundred and six cows, he's not holding cows of yours beyond the first hundred.

MS. CANTARELLA: Correct.

UNIDENTIFIED JUDGE 2: Okay. And here they're holding 48 thousand of yours, at best, they're not holding 52 and they're not even holding 57. You want that extra money because of your interpretation of the law. And when we get up to 52, they agree with you. With respect to 57, they don't agree with you, but in either case, even if you segregated his money, it would only be the 48, wouldn't it?

MS. CANTARELLA: Our position is because the money should have been paid out in this case, the additional five thousand dollars, it's still in the plan. It's still being held. Our claim is not contract-based, it's based on the requirements of ERISA.

And under Verity v. Howe, where the claimant cannot recover under the literal terms of the plan, ERISA provides a remedy where none would

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otherwise be available. And I think that again if you look at Nudson and Harris Trust, where they're talking

about restitution of funds that are being held by the Defendant that really belong to the Plaintiff, because if this money had been paid out, the plaintiffs would have it. That restitution of funds means money. If the money is being wrongfully withheld because it wasn't paid out and it should have been paid out, then again --

UNIDENTIFIED JUDGE 1: What happens if we decide you're right, they couldn't consult the pre-retirement mortality table, you're wrong in terms of the bilking, this one provision, this ERISA provision, that truly is legal, will you accept the end of the story?

MS. CANTARELLA: I'm not sure if I understand your question.

UNIDENTIFIED JUDGE 1: We agree with your first point, we disagree with the point you are making in response to Judge Nelson's question, that you invoked the wrong ERISA provision. In other words, this is legal relief, all right? You are misconstruing Nudson. What happens then? End of the road?

MS. CANTARELLA: I think we might have

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to do some sort of two-step. We might have to, to the extent that Your Honors believe that this claim falls under ERISA Section 502a1b or is actually legal relief rather than equitable relief, we would probably have to go back to Judge Enslen and say, "Your Honors, could we amend the plan and also add" --

JUDGE NELSON: Amend the plan.

MS. CANTARELLA: I mean the -- I'm sorry, the complaint. Excuse me.

JUDGE NELSON: Well, as I understand it, that would be a vain act, because if you amended the complaint to seek legal relief, you get the 48 thousand.

MS. CANTARELLA: And that's where

Verity/Howe comes in, because Verity/Howe says if there's a violation of an ERISA statute, and there it was the fiduciary duties under 404a, and there is no remedy available under the terms of the plan, that you can get relief under 502a3.

UNIDENTIFIED JUDGE 1: Can you explain that? I don't -- I'm not sure I understand the answer why, if it is legal relief, it's only 48 thousand. Is that because of the standard of review?

If it's a legal claim, you just acknowledged to Judge Nelson that it's only 48

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thousand. I guess I'm not sure I understand why --

MS. CANTARELLA: No, I don't, and I'm sorry if I did not explain myself very well. I don't necessarily -- would not make the point that our relief is only 48 thousand. I think one of the things that the defendants have tried to argue, at least in the district court, is that we would then not be able to get prejudgment interest because ERISA Section 502a1b allows you to recover benefits under the terms of the plan and there's nothing in the plan that allows the recovery of prejudgment interest.

So, it's a way of people that got a lump sum in 1992 or 1993, who basically have lost the time value of money now for 11 and 12 years --

UNIDENTIFIED JUDGE 1: Just one other question.

I understand the prejudgment interest plan. I guess I thought the real legal equitable debate here was the concern about the standard of review. That's I guess what I thought was driving things. And I guess what I'm not understanding is given the way you have argued the pre-retirement mortality of the claim, why you wouldn't win regardless of the standard of review?

MS. CANTARELLA: Well, Judge Enslen

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thought that we should win either way. I mean, he said regardless of the standard of review, I find that the Defendants' interpretation of the plan is unreasonable. So, I think that, yes --

UNIDENTIFIED JUDGE 1: That was arbitrary and capricious if it violates a reg that's a valid reg. And that's the way you started this.

MS. CANTARELLA: Right.

No, and I think that the part that we would have problems with would be the prejudgment interest for people that have already received a lump sum. We would not -- that wouldn't change anything for those who are going to receive a lump sum in the future.

UNIDENTIFIED SPEAKER: Okay, thank you, Counsel.

Any other questions? Thank you.

MS. CANTARELLA: Thank you so much.

MR. PISKORSKI: Any time left for rebuttal?

UNIDENTIFIED SPEAKER: No.

JUDGE NELSON: Thank you. The case will be submitted.

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CERTIFICATE OF TRANSCRIPTION

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

I hereby certify to the transcription of the foregoing proceedings. These proceedings were recorded on audiotape; said audiotape was not recorded by me nor under my supervision or control. I certify that this is as full, true, complete and correct transcription of the audiotape as the quality allows.

I do not certify to the identification of speakers not identified on the record.

Therease Headley, CSR-2266
Oakland County, Michigan
My Commission expires:
June 5, 2011.

(emphasis added).

MERITS EXCERPT FROM CROSBY'S APPEAL BRIEF

(appendix pages noted in this excerpt are to the appendix filed with Crosby's appeal brief, not to this Appendix)

B. Statutory and Regulatory Authority

Aside from the anti-forfeiture rules and case law just discussed, considerable additional statutory and regulatory authority supports Crosby's position. In the administrative proceedings, Crosby referenced IRS Notice 96-8 (Jan. 18, 1996), which primarily reviews long-existing present value rules under Code §417(e)(3) (the Code analogue to ERISA §205(g)(3)) and anti-forfeiture rules under Code §411(a) (the Code analogue to ERISA §203(a)). While reminding cash balance plans that they must comply with those rules, Notice 96-8 outlines the proper methodology for computing lump sum distributions from a cash balance plan. Explaining that interest credits to normal retirement age represent part of the participant's accrued benefit and, therefore, cannot be forfeited, Notice 96-8 utilizes no mortality discount for the period before age 65. In performing the lump sum calculation, Notice 96-8 utilizes solely the statutory discount rate under Code §417(e) which reflects only the time value of money, not the possibility of a forfeiture on account of death (because there isn't any before normal retirement age). IRS Notice 96-8 at Example (A32).

TR 1.401(a)(4)-8(c)(3)(iv)(C)(ix), a "safe harbor" non-discrimination rule pertaining exclusively to cash balance plans, incorporates an even more stringent limitation on the use of a mortality discount. Under this safe harbor, which Treasury issued in final form in 1991[13] and reissued unchanged in 1993, a cash balance plan may select from several specified interest crediting rates. One of these rates is

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[13] See Treasury Decision 8360.

derived from a project-forward/discount-back methodology based on the Code §417(e) interest rate and mortality table, and it expressly "assum[es] no mortality before normal retirement age." 26 C.F.R. §1.401(a)(4)-8(c)(3)(iv)(C)(ix) (emphasis added) (A21). Thus, the single safe harbor rate for cash balance plans derived from a project-forward/discount-back methodology specifically states that a mortality discount may not be utilized before normal retirement age. The reason is obvious: In a cash balance plan, interest credits to normal retirement age comprise part of the accrued benefit. Therefore, application of a mortality discount to the period before normal retirement age (i.e., to the project-forward period) would effectively cause an impermissible partial forfeiture of the participant's accrued benefit.

In December 2002, Treasury issued proposed TRs addressing anti-age discrimination rules under ERISA and the Code as applied to benefit accruals in cash balance plans. 67 FR 76123 (Dec. 11, 2002). Under the proposed TRs, a "traditional" defined benefit plan that converts to a cash balance must use "reasonable" actuarial assumptions to calculate the lump sum present value of a participant's accrued annuity benefit earned under the former plan that will become the participant's opening account balance under the new cash balance plan. 67 FR 76123, 76130. Significantly, the proposed TRs specifically note that application of a preretirement mortality discount when computing such lump sum present value would not be a reasonable actuarial assumption:

> Example 5. (i) . . . Effective as of the date of the conversion, hypothetical accounts are established equal to the present value of a participant's accrued benefit using section 417(e) interest and reasonable mortality assumptions (except no pre-retirement mortality is used).

67 FR 76123, 76133 (emphasis added) (A95).[14] In short, in every instance where Treasury has commented on the propriety of using a preretirement mortality decrement when computing a lump sum under a cash balance plan, it has indicated that application of such decrement would be unreasonable.

In other contexts where there can be no forfeiture of the benefit, ERISA and the Code specifically preclude the use of a mortality discount. For example, under ERISA §204(c), the accrued benefit derived from employee contributions is determined by (1) projecting the employee's accumulated contributions to normal retirement age utilizing the interest rate specified in ERISA §205(g)(3); (2) converting this accumulated amount to an annuity; and (3) then discounting this accrued annuity benefit to present value utilizing solely the interest rate set forth in ERISA §205(g)(3). 29 U.S.C. §1054(c)(2)(B)-(C). Notably, this statutory formula for determining the accrued benefit derived from employee contributions does not specify, and therefore does not permit, use of a preretirement mortality discount. Why? Because benefits derived from employee contributions may never be forfeited. 29 U.S.C. §1053(a)(1). Therefore, it would be unreasonable to value the benefit derived from employee contributions based upon the possibility that the benefit will not be paid in the event of the employee's death.

Another example pertains to Code §415(b), which (1) limits the maximum benefit payable under a defined benefit plan, and (2) "adjusts" any benefit subject to the present value rules in accordance with the interest rate and mortality table set forth in Code §417(e)(3). 26 U.S.C. §415(b). In explaining how to "adjust" benefits consistent with the §415 limit, the IRS's own manual states that a mortality discount may be utilized only to the extent the benefit is forfeited upon death. IRS Manual, §7.7.1 (03-11-98) (© 2002 RIA). Treasury imposes this

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[14] Although the proposed TRs have been partially repealed, this Example has not.

same limitation when computing the present value of a benefit under a non-qualified deferred compensation plan. 26 C.F.R. §31.3121(v)(2)-1(c)(2)(ii).

Defendants cannot credibly dispute that ERISA, the Code, and governing agency authority all recognize that a mortality decrement may be utilized only to the extent the benefit is forfeited upon the death of the participant. Because the Plan expressly precludes any forfeiture of the lump sum if the participant dies before normal retirement age, it was both unreasonable and unlawful for Bowater to utilize a preretirement mortality decrement when it re-computed Crosby's lump sum.

C. Unsolicited Actuarial Literature

Defendants' position is particularly perplexing as their own actuary, Hewitt Associates, signed-on to the 1992 Position Paper submitted to the IRS and Treasury expressly stating that cash balance plans typically assume no preretirement mortality (R21, Ex. 21, Position Paper at cover letter and p. 4, JA 655, 664). Similar statements have been made by many other actuaries, typically while presenting materials on cash balance plans during educational programs sponsored by our nation's leading actuarial organization--the Society of Actuaries ("SOA") (www.soa.org). These actuaries reason that cash balance plans provide a death benefit in the full amount of the participant's lump sum benefit. Larry Stahly, an actuary from Buck Consultants (a prominent national actuarial consulting firm), made this precise point during an SOA presentation on cash balance plans:

> MR. LARRY D. STAHLY: I'd like to give an overview of cash balance plans . . .
>
> * * *
>
> The interest rate credit on the account is usually the same as the index for the increasing annuity. Assume no mortality until age 65 because, upon death, the full account balance is paid to a beneficiary.

(R21, Ex. 11, Cash Balance, Floor Benefit, Target Benefit and Other Variations of Traditional Retirement Plans, Record, SOA, 1988 Vol. 14 No. 1, p. 260, JA 409) (emphasis added).

A few months later, in another SOA program on cash balance plans, actuary Maria Sarli of Kwasha Lipton, the actuarial consulting firm that originated the cash balance design, reiterated that cash balance plans assume no preretirement mortality:

> MS. MARIA M. SARLI: . . .Usually there's no preretirement mortality assumed in calculating the opening lump sum. That's typically because most cash-balance plans will provide the full account balance as a death benefit to both married and single employees.

(R21, Ex. 13, Cash-Balance Plans and Age-Weighted Profit-Sharing Plans (Basic), Record, SOA, 1992 Vol. 18 No. 1B, p. 626, JA 453).

In 1996, Gary Bayer, a Consulting Actuary for W. Alfred Hayes and Company (an actuarial and benefits consulting firm), wrote a letter to the IRS addressing potential anti-cutback concerns with respect to cash balance plans. In the letter, Bayer expressly notes that cash balance plans assume no mortality during either the project-forward or discount back period:

> A "full reserve" pre-retirement death benefit is offered prior to retirement, so mortality is not used for either accumulating or discounting values during the discount period.

(R21, Ex. 15, February 14, 1996 Letter to IRS from Gary T. Bayer, FSA, Consulting Actuary, at p. 1, JA 492 (emphasis added).

In 1999, the SOA commissioned Bolton Offutt Donovan,

Inc. ("BOD"), an actuarial benefits and investment consulting firm, to prepare a report on cash balance design and funding issues (R21, Ex. 16, BOD web pages at last ¶, JA 499). The SOA published BOD's study in December 2000 (R21, Ex. 17, Actuarial Aspects of Cash Balance Plans, Pension Forum, SOA, 2000 Vol. 12 No. 1, JA 500). In describing the present value methodology the PBGC might employ to determine whether a cash balance plan is sufficiently funded, BOD notes that a mortality discount must not be utilized for the period before age 65:

> Discounting back for interest and no mortality at PBGC rates produces a present value of $8,195.

(Id. at p. 34, JA 543) (emphasis added).

In 2000, the SOA solicited papers on cash balance plans (R21, Ex. 18, Cash Balance Pension Plans, Call for Papers, SOA (2000), JA 591). In response, the SOA received eight papers from actuaries around the country, including one written by Carl L. Frammolino, a principal of Rudd and Wisdom, Inc., an actuarial consulting firm in Houston, Texas (R21, Ex. 19, Cash Balance Papers, Pension Section News, SOA, Sept. 2001 Vol. 47, JA 594; and R21, Ex. 20, C. Frammolino, The Guaranteed Investment Defined Contribution Plan, SOA (2000), JA 596). Frammolino's article, which won an honorable mention, discussed a defined contribution floor offset plan ("the GDIC") that used a cash balance defined benefit plan as the floor plan. Id. Frammolino repeatedly notes that a preretirement mortality discount may not be used when computing a lump sum from the cash balance plan:

TABLE 1: . . .

Item	Cash Balance Floor Plan (CBFP)
* * *	
Plan Lump Sum Basis Crediting	Preretirement: Interest Rate/**No Mortality;** Post ret.: 417(e)(3) Basis
* * *	
Death Benefit	100% of Accrued Benefit

* * *

5.2 Cash Balance Safe Harbor Testing Method and Cross Testing

* * *

[T]he increase in the Cash Balance (frontloaded interest credit) plan accrued benefit converted to the plan's normal form under the plan's lump sum basis are converted to equivalent allocation rates using a standard interest assumption and standard postretirement mortality assumption (**no preretirement mortality**).

* * *

6. "True Defined Contribution Plan Operational Appeal"

* * *

• the Cash Balance Floor plan's lump sum basis uses the following preretirement and postretirement sets of assumptions

◊ preretirement interest assumption equal to the crediting interest rate **and no preretirement mortality**

* * *

Table 4: . . .

Assumption	**CB Floor Plan Lump Sum Basis**
Preretirement Interest	Last Known (Safe Harbor) Crediting Interest Rate
Preretirement Mortality	**None**

* * *

APPENDIX B: . . .

* * *

Since the **preretirement assumptions** for the Cash Balance Floor plan's lump sum basis are an interest assumption of [math symbol] **and no mortality** . . .

* * *

APPENDIX C: . . .

* * *

Current liability valuations will **ignore preretirement mortality due to the 100% GIDC death benefit provision.**

(Id. at pp. 8-9, 19, 26, 30, 48, 54, JA 603-604, 614, 620, 624, 642, 648) (emphasis added).

Because they cannot substantively attack the preceding statements, defendants contend that they constitute inadmissible hearsay. Except for the 1992 Position Paper and letter by Gary Bayer, each of the foregoing statements was made in an educational context and published by the SOA with the actuaries' permission (R33, Ex. 29, Affidavit of Eva T. Cantarella and attachments thereto, JA 993). In addition to being our nation's preeminent actuarial organization, the SOA is a 501(c)(3) corporation, with a stated corporate purpose of educating the public (www.soa.org). Thus, the statements constitute relevant unsolicited actuarial literature, not evidence. To the extent they constitute evidence, they clearly

satisfy the residual hearsay exception under Fed. R. Evid. 807. The Position Paper on cash balance plans and letter by Gary Bayer were submitted to (and are on file with) the IRS and, therefore, are a matter of public record. (See also R33, Ex. 25, Affidavit of Christopher E. Bergin, JA 905) (re Position Paper). Accordingly, they satisfy the hearsay exception under Fed. R. Evid. 803(6).

Defendants nevertheless insist that this Court should (1) disregard the numerous statements by Frammolino that a preretirement mortality discount may not be utilized when computing a lump sum from the cash balance plan; and (2) focus, instead, on a single mathematical equation in an Appendix at the end of his paper. DOB at 39. Although that equation *does* employ a preretirement mortality discount, it does so because the specific plan design there expressly assumes preretirement mortality. Therefore, the equation is, and was, irrelevant to the issue before the District Court. The parts of Frammolino's paper that Crosby quotes relate to a plan that, like the Plan, pays the full lump sum to the participant's beneficiary if the participant dies before normal retirement age.

Finally, defendants make the outrageous and false allegation that Crosby and the Lyons plaintiffs "misrepresented" the substance of Frammolino's and Sarli's statements. DOB at 40-41. After the Lyons plaintiffs submitted the same quoted statements to the district court there, Georgia-Pacific's counsel contacted Frammolino who, thereafter, proffered an affidavit, a copy of which Bowater subsequently obtained and submitted to the District Court here (R28, Ex. 5, JA 828).

In his affidavit, Frammolino complains that the Lyons plaintiffs incorrectly cited his paper for the proposition that a preretirement mortality decrement may never be utilized in computing the present value of an annuity benefit. He further complains that the Lyons plaintiffs omitted (1) the heading to Table 1 of his paper ("Illustrative Calendar Year GIDC Plan Provisions"), and (2) a description immediately above the quoted part of Table 1 that reads "417(e)(3) Statutory

Minimum Lump Sum Basis," identifying the 83 GAM, making no distinction between pre-and post-retirement mortality (R28, Ex. 5, Frammolino Aff. at ¶¶4, 5, 7, JA 829-830).

The Lyons plaintiffs did not contend that a preretirement mortality discount may never be utilized, and they did not cite Frammolino's paper for that proposition. Rather, like Crosby, they cited Frammolino's paper solely for the proposition that where a cash balance plan assumes no preretirement mortality, a preretirement mortality discount may not be utilized (R28, Exs. 2 and 3, Lyons plaintiffs briefs, JA 711, 774). Frammolino's paper clearly and undeniably supports this point. Further, immediately below the 1983 GAM identified in Table 1, Frammolino expressly states that "No Mortality" is assumed for the preretirement period (R20, Ex. 20, Frammolino paper at 9, JA 604). Far from negating the Lyons plaintiffs' and Crosby's position regarding preretirement mortality, Table 1 underscores the point that if a cash balance plan assumes no preretirement mortality, a preretirement mortality discount may not be utilized.

Georgia-Pacific's attorneys also contacted Sarli (quoted, *supra*), now a principal at PriceWaterhouseCoopers, the same company that employs Georgia-Pacific's expert, Larry Sher (R28, Ex. 6, Sarli Aff., JA 831; and R33, Ex. 26, Sher Aff., JA 907). Not surprisingly, Sarli submitted an affidavit on behalf of Georgia-Pacific, a copy of which the defendants here proffered to the District Court in this case (R28, Ex. 6, JA 831). In her affidavit, Sarli contends that the Lyons plaintiffs took her prior recorded statement that cash balance plans assume no preretirement mortality out of context because, a few sentences later in her presentation, she explained that her calculations were not in accordance with Code §417(e) (Id. at ¶8, JA 833). Sarli's disingenuous attempt to retreat from her stated position necessarily fails, as her subsequent "explanation" pertained exclusively to the interest discount rate she utilized (R20, Ex. 13, p. 626, JA 453).

Conspicuously absent from Sarli's and Frammolino's affidavits is *any* statement that cash balance plans assume preretirement mortality, or that a preretirement mortality

discount may be utilized when computing a lump sum from a cash balance plan that pays the lump sum to the participant's surviving spouse or beneficiary if the participant dies before normal retirement age. Indeed, even Georgia-Pacific's expert, Larry Sher, was unwilling to state that a preretirement mortality decrement may be utilized when computing a lump sum from a cash balance plan, although he danced around the issue by repeatedly asserting that "traditional" (i.e., not "cash balance") defined benefit plans assume preretirement mortality (R33, Ex. 26, Sher Aff. at ¶¶ 14-16, JA 912-913; R33, Ex. 27, Motion to Strike Sher Aff. at 10-18, JA 934-942; and R33, Ex. 28, Sher's Dep. Tr. at 141, 156-157, JA 975, 978). Larry Sher participated in the Position Paper on cash balance plans which, as discussed, expressly states that cash balance plans typically do not assume preretirement mortality (R33, Ex. 28, Sher Dep. Tr. at 103-104, JA 969).[15]

Lastly, defendants argue that "contrary to Crosby's repeated assertion" that the SOA has opined on the preretirement mortality issue, Judy Anderson of the SOA submitted an affidavit in Lyons stating that speakers at SOA educational conferences and authors of papers published by the SOA "express their own views," not those of the SOA (R28, Ex. 4, Anderson Aff. at ¶5, JA 826) (emphasis added). That was precisely the point! Experienced pension actuaries all agree that cash balance plans assume no preretirement mortality.

* * *

[15] Defendants also make the argument that the quoted statements from 1988 to 1992 did not address mortality because, at that time, the present value rules did not restrict the mortality table plans could utilize. DOB at 38 n. 15. This Court need only review those statements to appreciate the imprudence of this argument.